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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 669.

SYLVESTER PENNOYER, PLAINTIFF IN ERROR,

vs.

MARCUS NEFF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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FILED 22d MARCH, 1877.

Dec 15 1879

Affirmed

Geo Ticknor

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Oregon, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between Marcus Neff, plaintiff, and Sylvester Pennoyer, defendant, a manifest error hath happened, to the great damage of the said Sylvester Pennoyer, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and

2 there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24th of February, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] RALPH WILCOX, *Clerk.*

Allowed. MATTHEW P. DEADY,
U. S. District Judge, Or.

3 (Endorsed:) Circuit Court of the United States for the District of Oregon. Sylvester Pennoyer, plff. in error, vs. Marcus Neff, deft. in error. Writ of error. Filed February 24, 1877. Ralph Wilcox, clerk.

4 In the Circuit Court of the United States for the District of Oregon.

MARCUS NEFF, PLAINTIFF,
vs.
SYLVESTER PENNOYER, DEFENDANT.

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges: That he, plaintiff, is a citizen of the State of California, and that defendant is a citizen of the State of Oregon; that he, the said plaintiff, is the owner in fee simple and is lawfully entitled to the possession of the following-described real estate, to wit: Situated in and lying and being in Multnomah county, State of Oregon, and consisting of parts of

sections twenty-nine and thirty, in township one north of range one east, according to the official plat of survey returned to the General Land Office by the surveyor-general, being bounded and described as follows, to wit: Beginning at the southwest corner of said section twenty-nine and running thence east fifteen chains and eighteen links, thence north fifty-nine chains, thence north forty-five degrees west twenty-two chains, thence north three chains and seventy-five links, thence south forty-four degrees and thirty minutes west fifty-two chains, thence south forty-one chains and fifty links, and thence east thirty-six chains and ninety-two links to the place of beginning. That the defendant wrongfully with-
5 holds the possession of the whole of said described real estate from plaintiff, save and except the following portion thereof embraced in the foregoing boundaries, to wit: a piece of land commencing at the north corner of the Marcus Neff land-claim, in township one north of range one east of the Willamette meridian, thence south three and seventy-five hundreths (3.75) chains, thence south forty-five degrees east (S. 45° E.) twenty-two and fifty-three hundredths chains (22.53), thence south four and thirty-six hundreths chains (4.36), thence west thirty-nine and sixty-two hundredths chains (39.62), thence north forty-four and one-half degree east (N. 44½ E.) thirty-three and seventy hundredths (33.70) chains to said north corner of the Marcus Neff land-claim.

That the value of the said lands herein sought to be recovered is ($15,000) fifteen thousand dollars.

Wherefore plaintiff prays judgment for the possession of the said real estate so wrongfully withheld from plaintiff by defendant, and for costs and disbursements.

W. W. PAGE, AND
WHALLEY & FECHHEIMER,
Att'ys for Plaintiff.

UNITED STATES OF AMERICA, } *ss.*
DISTRICT OF OREGON. }

I, W. W. Page, being first duly sworn, say on oath, that I am one of the attorneys for the plaintiff named in the above com-
6 plaint; that said plaintiff is not within the state or district of Oregon, which is the reason why I make this affidavit; that all the material allegations of said complaint are within my knowledge, and that said foregoing complaint is true, as I verily believe.

W. W. PAGE.

Sworn to and subscribed before me, this 10th day of September, A. D. 1874.

RALPH WILCOX, *Clerk.*

(Endorsed:) Filed September 10, 1874. Ralph Wilcox, clerk.

In the Circuit Court of the United States for the District of Oregon.

MARCUS NEFF, PLAINTIFF,
vs.
SYLVESTER PENNOYER, DEFENDANT. } Summons.

The President of the United States of America to the marshal of said district or his deputy, greeting:

You are hereby commanded that you summon Sylvester Pennoyer to be and appear in the Circuit Court of the United States for the District of Oregon, to be holden at Portland, in said district, to answer unto Marcus Neff in an action at law, and that if he fail to answer the complaint therein the plaintiff will take judg-
7 ment for the possession of the premises described in the complaint.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court hereto affixed, this 11th day of September, A. D. 1874.

[SEAL.] RALPH WILCOX, *Clerk*,
By ED. WILCOX, *Dep'ty.*

DISTRICT OF OREGON, *ss.*

In obedience to the command of the within writ, I have served the same upon the therein-named Sylvester Pennoyer by exhibiting same to him, and by delivering to him personally a true copy thereof, together with a copy of the complaint in the within action, at Portland, Oregon, in said district, on the 12th day of September, A. D. 1874.

DAN'L J. MALARHEY, *U. S. Marshal*,
By SAM. C. MILLS, *Deputy.*

(Endorsed:) Returned and filed Sept. 14, 1874. Ralph Wilcox, clerk, by Ed. Wilcox, dep'ty.

8 In the Circuit Court of the United States for the District of Oregon.

MARCUS NEFF, PLAINTIFF,
vs.
SYLVESTER PENNOYER, DEFENDANT. }

Now comes the above-named defendant and, for his answer to plaintiff's complaint in the above-entitled action, denies that the said plaintiff is the owner in fee simple or is lawfully entitled to the possession of the real estate described in plaintiff's complaint, to wit: Situate and lying and being in Multnomah county, State of Oregon, and consisting of parts of sections twenty-nine (29) and thirty (30) in T. 1, N. R. 1 E., according to the official plat of survey returned to the General Land Office by the surveyor-general, being bounded

and described as follows, to wit: Beginning at the S. W. corner of said section twenty-nine (29) and running thence east 15 chains 18 links, thence north 59 chains, thence north 45° west 22 chains, thence north 3 chains 75 links, thence south 44° 30′ west 52 chains, thence south 41 chains 50 links, thence east 36 chains 92 links to the place of beginning, or any part or parcel thereof.

The defendant denies that defendant wrongfully withholds the possession of the whole of said described real estate from the plaintiff, save and except the following portion thereof embraced in the following boundaries, to wit: a piece of land commencing at the north corner of the Marcus Neff land-claim in T. 1, N.
9 R. 1 E. of the Willamette meridian, thence south 3.75 chains, thence south 3.75 chains, thence south 45° east 22.53 chains, thence south 4.36 chains, thence west 39.62 chains, thence north 44½° east 33.70 chains to said north corner of the Marcus Neff land-claim, or any portion thereof, as in the complaint alleged or in any manner whatever.

The defendant, for a further and separate answer to the plaintiff's complaint, alleges that defendant is the owner in fee simple of the whole of the premises first above described, save and except that portion of said premises last above described, and that defendant is lawfully in the possession of the same, and is lawfully entitled to the possession thereof,

Wherefore the defendant prays this hon. court to adjudge that the plaintiff is not entitled to the possession of said real estate or any portion thereof, and that this defendant is the owner in fee simple of said real estate, and that he is lawfully entitled to the possession thereof. And that defendant have and recover of and from the plaintiff his costs and disbursements.

DURHAM & THOMPSON,
Attorneys for Defendant.

UNITED STATES OF AMERICA, } *ss.*
DISTRICT OF OREGON. }

I, Sylvester Pennoyer, being first duly sworn, say that I am the defendant in the above-entitled action, that I have read
10 and know the contents of the foregoing answer, and that the matters therein stated are true, as I verily believe.

SYLVESTER PENNOYER.

Sworn to and subscribed before me, this 15th day of September, A. D. 1874.

RALPH WILCOX, *Clerk*,
By ED. WILCOX, *Deputy*.

(Endorsed:) Filed Sept. 15, 1874. Ralph Wilcox, Clerk, by Ed. Wilcox, Deputy.

(Endorsed:) District of Oregon, ss. I hereby certify that I delivered a certified copy of the within answer to W. W. Page, one

of plaintiff's attorneys. Portland, Sept. 17th, 1874. Danl. J. Malarhey, U. S. Marshal, per Sam. C. Mills, Deputy.

11 In the Circuit Court of the United States for the District of Oregon.

MARCUS NEFF, PLAINTIFF,
vs.
SYLVESTER PENNOYER, DEFENDANT. } Reply.

The plaintiff, for reply to the answer of the defendant, denies that the defendant is the owner in fee simple of the whole or any part or parcel of the premises described in the plaintiff's complaint, and denies that the defendant is lawfully in the possession of the said premises or any portion thereof, or is lawfully entitled to the possession thereof.

Wherefore plaintiff prays for judgment, as asked in his complaint.

W. W. PAGE,
WHALLEY & FECHHEIMER,
Attys. for Plaintiff.

DISTRICT OF OREGON.

I, W. W. Page, being sworn, say that I am one of the attorneys for the plaintiff, and that the plaintiff is not within this district, therefore I make this verification, and that the foregoing reply is true, as I verily believe. W. W. PAGE.

Subscribed and sworn to before me, this Sept. 17, 1874.
RALPH WILCOX, *Clerk*,
By ED. WILCOX, *Deputy*.

12 (Endorsed:) Filed Sept. 17, 1874. Ralph Wilcox, clerk, by Ed. Wilcox, dep'ty.

In the Circuit Court of the United States for the District of Oregon.

MARCUS NEFF, PLAINTIFF,
vs.
SYLVESTER PENNOYER, DEFENDANT. }

It is stipulated between the parties to this action that issues herein joined may be tried by the court, without the intervention of a jury.

September 21, 1874, Portland, Oregon.

W. W. PAGE, AND
WHALLEY & FECHHEIMER,
Attorneys for Plff.
DURHAM & THOMPSON,
Attorneys for Defendant.

(Endorsed:) Filed September 21, 1874. Ralph Wilcox, clerk.

13 The United States Circuit Court, District of Oregon.

MARCUS NEFF *vs.* SYLVESTER PENNOYER. } Action to recover the possession of real property.

This cause being tried by the court without the intervention of a jury, in pursuance of the stipulation of the parties heretofore filed, now at this day the court finds and states the facts therein, as follows:

I. That on March 19, 1866, there was duly issued to the plaintiff, as a settler under the act of Congress of September 27, 1850, commonly called the Donation Law, by the proper officers of the United States, a patent for the premises in controversy and described in the complaint, the same being donation claim numbered fifty-seven, settled and claimed under said law.

II. That on November 3, 1865, J. H. Mitchell commenced an action in the circuit court for the county of Multnomah and State of Oregon, against Marcus Neff, the plaintiff herein, then a non-resident of the state, for the sum of $253.14 cents in legal-tender notes, in which action said court, on February 19, 1866, gave judgment, for want of an answer, in favor of said Mitchell and against said Neff, for the sum of $258.18 cents, together with the costs and disbursements of the action, taxed at $36.80 cents; that on August 7, 1866, the premises aforesaid were sold, upon an execution
14 issued out of said circuit court on July 9, 1866, for the purpose of enforcing the said judgment of said circuit court, by Jacob Stitzel, the sheriff of said Multnomah county, to said Mitchell, and said sheriff thereupon made and delivered to Mitchell a certificate of sale as provided by law, which certificate of sale was, on August 10, 1866, assigned by said Mitchell to Sylvester Pennoyer, the defendant herein, which assignment was in writing, under seal, and acknowledged as a conveyance of lands, and purported to be made "for value received," and "to assign, transfer, set over, and convey unto said Sylvester Pennoyer all the right, title, interest, and claim" of the assignor to said "certificate of sale and to the land described therein."

III. That on January 14, 1867, said sheriff, by his deputy, C. B. Upton, made and delivered an instrument in writing, purporting to be a conveyance of the premises aforesaid in pursuance of said sale upon said execution, to said Pennoyer, as the assignee of said Mitchell, which instrument was not under seal, and was acknowledged before the clerk of said circuit court, on the date last aforesaid, by said sheriff, by "C. B. Upton, his deputy," and filed for record on January 12, 1867; that on July 25, 1874, said sheriff, as ex-sheriff of said county, executed and delivered to said Pennoyer, as assignee aforesaid, and in pursuance of the sale aforesaid, a deed to the premises aforesaid; and that on July 21, 1874, E. J. Jeffery, then being the sheriff of said county, as such sheriff executed and de-

livered to said Pennoyer, as assignee aforesaid, and in pur-
15 suance of the sale aforesaid, a deed for the premises afore-
said.

IV. That on November 13, 1865, said Mitchell applied to said circuit court, upon his own affidavit of that date, for an order allowing the service of the summons in said action to be made upon said Neff by publication thereof; whereupon said court made said order in the words following: "Now, at this day, comes the plaintiff in his proper person, and by his attys., Mitchell and Dolph, and files affidavit of plaintiff and motion for an order of publication of summons, as follows, to wit: 'Now comes the plff., by his attorneys, and upon the affidavit of plff., herewith filed, moves the court for an order of publication of summons against deft., as required by law, he being a non-resident;' and it appearing to the satisfaction of the court that the defendant cannot, after due diligence, be found in this state, and that he is a non-resident thereof, that his place of residence is unknown to plff. and cannot, with reasonable diligence, be ascertained by him, and that the plaintiff has a cause of action against deft., and that defendant has property in this county and state, it is ordered and adjudged by the court that service of the summons in this action be made by publication for six weeks successively in the 'Pacific Christian Advocate,' a weekly newspaper, published in Multnomah county, Oregon, and this action is continued for such service;" that the affidavit of plaintiff, referred to
in said order, is in the words following: I, J. H. Mitchell,
16 being first duly sworn, say that the deft., Marcus Neff, is a
non-resident of this state; that he resides somewhere in the State of California, at what place, affiant knows not, and he cannot be found in this state. That plaintiff has a just cause of action against defendant for a money demand on account. That this court has jurisdiction of such action. That the defendant has property in this county and state;" that the complaint in said action was verified and filed on November 3, 1865, and contained facts tending to prove that at that date said Mitchell had a cause of action against said Neff for services as an attorney, performed "between January 1, 1862, and May 15, 1863;" that the entry of judgment in said action contained the following averments: "And it appearing to the court that the defendant was, at the time of the commencement of this action, and ever since has been, a non-resident of this state; and it further appearing that he has property in this state, and that defendant had notice of the pendency of this action by publication of the summons for six successive weeks in the 'Pacific Christian Advocate,' a weekly newspaper of general circulation, published in Multnomah county, State of Oregon, the last issue of which was more than twenty days before the first day of this term;" that the affidavit showing the publication of the summons in the Advocate aforesaid was made as stated therein by

the "editor" of that paper; that said complaint, summons, affidavit of Mitchell's and "editor" of the Advocate aforesaid,
17 and entry of judgment were in the judgment-roll, made up by the clerk in the case, but the order for publication of the summons aforesaid was not placed in said roll by said clerk, but remains on the files of said court; and that when said court made said order for publication and gave said judgment against Neff, the only evidence it had before it to prove the facts necessary to give it jurisdiction therefor, and particularly to authorize it to find and state that Neff's residence was unknown to Mitchell and could not, with reasonable diligence, be ascertained by him, and that Neff had notice of the pendency of said action by the publication of the summons as aforesaid, was, so far as appears by the said roll and the records and files of the said court, the said complaint and affidavits of Mitchell and the editor of the Advocate.

V. That, and before the commencement of this action, the plaintiff herein was a citizen of California, and the defendant a citizen of Oregon, as alleged in the complaint herein, and that the premises in controversy and described in the complaint exceed in value the sum of five hundred dollars.

And as conclusions of law from the foregoing, the court now finds and states as follows:

I. That on November 3, 1865, the plaintiff, Neff, was the owner in fee of the premises aforesaid and entitled to the possession thereof.

II. That said circuit court of Multnomah county never
18 acquired jurisdiction to make an order for the publication of the summons in the action of Mitchell v. Neff, aforesaid, or to give any judgment therein against said Neff or the premises aforesaid or upon which said premises could be lawfully seized or sold.

III. That the sale aforesaid of the premises aforesaid upon an execution issued to enforce said judgment in Mitchell v. Neff, aforesaid, and the certificate, assignment, and conveyance aforesaid made and delivered in pursuance and by the authority, were and are illegal and void.

IV. That the plaintiff, Neff, at and before the commencement of this action was the legal owner in fee of the premises aforesaid, and was then, and still is, entitled to the possession thereof, which possession said Pennoyer then did, and still does, wrongfully withhold from said plaintiff.

V. That the plaintiff, Neff, is entitled to recover from the defendant, Pennoyer, the possession of said premises, together with the costs and expenses of this action.

DEADY, *J.*

(Endorsed:) Filed March 22, 1875. Ralph Wilcox, clerk.

19 Monday, April fifth, A. D. 1875.

MARCUS NEFF
vs.
SYLVESTER PENNOYER. } Action to recover possession of real property.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. J. W. Whalley, of counsel, and moves the court for judgment upon the findings of fact and law heretofore filed and entered in this cause. Therefore it is considered that the said plaintiff do have and recover *off* and from the said defendant, the possession of the premises described in the complaint herein, together with the costs and expenses of this action to be taxed.

20 UNITED STATES OF AMERICA, } *ss.*
DISTRICT OF OREGON. }

I, Ralph Wilcox, clerk of the Circuit Court of the United States for the District of Oregon, hereby certify that the foregoing transcript has been by me compared with the original records and files in said cause, and that the same is a full, correct, and complete transcript of said records and files and of the whole thereof.

[SEAL.] In testimony whereof I have hereunto set my hand and the seal of said court, this first day of March, A. D. 1877.

RALPH WILCOX, *Clerk.*

21 Circuit Court of the United States for the District of Oregon.

SYLVESTER PENNOYER, PLAINTIFF IN ERROR,
vs.
MARCUS NEFF, DEFENDANT IN ERROR. }

Now, at this time comes the said Sylvester Pennoyer, plaintiff in error, by W. F. Trimble, his attorney, and says:

That in the record and proceedings, as also in the rendition of the judgment, in the court aforesaid, in the suit of Marcus Neff, plaintiff, vs. Sylvester Pennoyer, defendant, there are manifest errors, in this, to wit:

1st. The said circuit court, in its conclusions of law, based upon the special findings of fact in said cause, ERRED in holding and deciding that the Circuit Court of the State of Oregon for Multnomah county acquired no jurisdiction to make and render the order for the publication of the summons in the action of J. H. Mitchell vs. Marcus Neff, in said court, or to give any judgment therein against said Neff or the premises specified in said findings of fact,
22 or upon which said premises could be lawfully seized or sold.

2nd. The said circuit court ERRED in holding and deciding that the proof of the publication of the summons in the action of Mitchell vs. Neff in the said state circuit court was not according to law.

3rd The said circuit court ERRED in holding and deciding that the Circuit Court of the State of Oregon for the county of Multnomah had no jurisdiction in the said action of Mitchell vs. Neff whereby it could render judgment therein.

4th. The said circuit court ERRED in holding and deciding that the sale of the said premises, upon an execution issued to enforce said judgment in the said action of Mitchell vs. Neff, was illegal and void; and that the certificate of the sheriff, assignment thereof, and conveyances made and delivered to the said Sylvester Pennoyer, in pursuance and by the authority aforesaid, were illegal and void.

5th. The said circuit court ERRED in holding and deciding
23 that the said Marcus Neff, at the commencement of his action in the said circuit court of the United States, and at the time of said judgment, was the legal owner in fee of said premises and entitled to the possession thereof, and that the said Pennoyer wrongfully withheld the same.

6th. The said circuit court ERRED in holding and deciding that the said Marcus Neff was entitled to recover from the said Sylvester Pennoyer the possession of said premises.

7th. There is also ERROR in this, to wit: that by the record aforesaid it appears that the judgment aforesaid given was given for the said Marcus Neff against the said Sylvester Pennoyer for the recovery of the possession of said premises, whereas by the law of the land the said judgment ought to have been given for the said Sylvester Pennoyer against the said Marcus Neff.

And the aforesaid errors are manifest upon the record, because it appears by the special findings of fact that every legal step had been duly taken in the said action of Mitchell vs. Neff, accord-
24 ing to the laws of the land, and the statutes of Oregon then in force, to enable and authorize the Circuit Court of the State of Oregon for Multnomah county to render the order requiring the service of the summons therein to be made by publication; and the recital of facts in said order, found by the court, shows that the said Circuit Court of the State of Oregon for Multnomah county had jurisdiction to make said order; and the judgment thereinafter rendered upon the publication of said summons, and the recital of facts in said judgment entry show that the said State Circuit Court of Oregon had jurisdiction to render the said judgment of Mitchell vs. Neff, and the same was legal and valid; and from the special findings of fact herein it appears that the sale of the said premises upon execution issued to enforce said judgment of Mitchell vs. Neff was legal and valid, and that the certificate thereof given to the purchaser, and the transfer thereof, and conveyances made and
25 delivered to the said Sylvester Pennoyer, in pursuance and by the authority aforesaid, were legal and valid, and vested in him the legal title in fee in said premises.

Wherefore the said Sylvester Pennoyer prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing,

and that he may be restored to all things which he hath lost by reason of said judgment.

W. F. TRIMBLE,
Attorney for Sylvester Pennoyer, Plff. in Error.

26 (Endorsed:) Circuit Court of the United States for the District of Oregon. Sylvester Pennoyer, plff. in error, vs. Marcus Neff, deft. in error. Assignment of errors. Filed February 24, 1877. Ralph Wilcox, clerk. W. F. Trimble, atty. for plff. in error.

27 THE UNITED STATES OF AMERICA, *ss*:

To Marcus Neff, Defendant in Error, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington city, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein Sylvester Pennoyer is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

In testimony whereof I, Matthew P. Deady, Judge of the
28 Circuit Court of the United States for the District of Oregon, have hereunto subscribed my name, this 24th day of February, A. D. 1877.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

DISTRICT OF OREGON, *ss*:

On this 27th day of February, A. D. 1877, personally appeared W. F. Trimble, before me, the subscriber, clerk of the U. S. circuit court for the district aforesaid, and makes oath that he delivered a true copy of the within and foregoing citation to the within-named Marcus Neff, defendant in error, in person, in the county of Multnomah, in said district, on the 26th day of February, A. D. 1877.

W. F. TRIMBLE.

Sworn to and subscribed befored before me, this 27th day of February, A. D. 1877.

RALPH WILCOX, *Clerk.*

Due service of the above citation is this day acknowledged, February 27, 1877.

W. W. PAGE,
Atty. for Deft. in Error, Marcus Neff.

29 (Endorsed:) Circuit Court of the United States for the District of Oregon. Sylvester Pennoyer, plaintiff in error, vs. Marcus Neff, defendant. Citation to the defendant in error. Filed February 27, 1877. Ralph Wilcox, clerk.

30 *Security on writ of error.*

In the Circuit Court of the United States for the District of Oregon.

MARCUS NEFF, PLAINTIFF,
vs.
SYLVESTER PENNOYER, DEFENDANT.

Know all men by these presents: That we, Sylvester Pennoyer, as principal, and Lloyd Brooke, as surety, are held and firmly bound unto Marcus Neff, above-named, in the full and just sum of three hundred dollars, to be paid to the said Marcus Neff, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 24th day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas, lately, to wit: on the 5th day of April, A. D. 1875, in a suit depending in the said Circuit Court of the United States for the District of Oregon, wherein Marcus Neff was plaintiff and Sylvester Pennoyer was defendant, at a term of said circuit court then held at the city of Portland, Oregon, a judgment was rendered against the said Sylvester Pennoyer, in said suit, for the recovery of the possession of a certain tract of land, and the said Sylvester Pennoyer having obtained a writ of error and filed a copy
31 thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Marcus Neff citing and admonishing him to be and appear at a supreme court of the United States to be holden at Washington the second Monday of October next.

Now the condition of the above obligation is such, that if the above-named Sylvester Pennoyer, plaintiff in error, shall prosecute his writ to effect and shall answer and pay all costs, if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

SYLVESTER PENNOYER. [SEAL.]
L. BROOKE. [SEAL.]

Sealed and delivered in presence of—

THEODORE WYGANT.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF OREGON. }

I, Lloyd Brooke, being duly sworn, say that I am a resident and freeholder in Multnomah county, in said district, and worth the sum of six hundred dollars over and above all debts and liabilities and property exempt from execution.

L. BROOKE.

Subscribed and sworn to before me, this 24th February, 1877.

[Notarial Seal.] THEO. WYGANT,
Notary Public for Oregon.

32 (Endorsed:) Approved. Matthew P. Deady, U. S. District Judge, Oregon.

(Endorsed:) Filed Eebruary 24, 1877. Ralph Wilcox, clerk.

33 Decision in the U. S. Circuit Court by Judge Deady.

United States Circuit Court, District of Oregon.
Tuesday, March 9, 1875.

Marcus Neff v. Sylvester Pennoyer—Action to recover possession of real property.

1. *Power of a state over the property of non-residents.* A state has the power to subject the property of non-residents, within its territorial limits, to the satisfaction of the claims of her citizens against such non-residents by any mode of procedure which it may deem proper and convenient under the circumstances, and, therefore, may, for such purpose, authorize a judgment to be given against such non-resident prior to the seizure of such property and with or without notice of the proceeding.
2. *Proof of service in case of publication.* The proof of service required by § 269 of the Oregon Code to be placed in the judgment roll includes in the case of service by publication, the affidavit and order for publication, as well as the affidavit of the printer to the fact of publication.
3. *Judgment roll, not the whole record.* The judgment roll required by said § 269 is not the exclusive record of the case, but only a collection of papers and entries selected from the record for convenience and economy and sufficient in the opinion of the legislature to show the judgment of the court and its jurisdiction to give it; but the record is a history of all the acts and proceedings in the action from its initiation to final judgment, which includes all the papers filed in the case, and upon which the court acted in any step of the proceedings, and this record is of the same verity as the judgment roll which is made up from it.

4. *Evidence necessary to authorize order for publication.* In case of service by publication the record must show there was evidence presented to the court or judge who made the order for publication by affidavit, sufficient to prove the ultimate facts which bring the case within §§ 55 and 56 of the Or. Code allowing such service; and it is not enough that the affidavit repeats the mere language of the statute, it must contain facts and circumstances sufficient to prove these ultimate facts; but when a judgment is attacked collaterally it is sufficient if the evidence contained in the affidavits tends to prove such facts.
5. *Evidence of cause of action.* An averment in an affidavit for an order for publication, "that plaintiff has a just cause of action against defendaant for a money demand on account," is a mere assertion of the fact of the existence of such cause of action—the opinion of the affiant to that effect, but is no evidence of it and is, therefore, insufficient to authorize such order.
6. *A verified complaint an affidavit.* A verified complaint as to the facts stated therein is an affidavit, and when it appears from the record that such a complaint, containing evidence of a cause of action against the defendant, was on file at the time of allowing an order for publication, the court will presume that such complaint was used as evidence therefor.
7. *Diligence to ascertain the place of residence of non-resident defendant.* When an order allowing service of a summons by publication, under §§ 55 and 56 of the Or. Code, omits to direct that a copy of the complaint and summons be mailed to the defendant, addressed to his place of residence, it must appear from the affidavit that the plaintiff had used reasonable diligence to ascertain such place of residence and that it is unknown to him.
8. *Proof of publication of the summons.* § 69 of the Or. Code having provided that in case of publication of the summons "the proof of service" shall be by "the affidavit of the printer or his foreman or his principal clerk," an affidavit to such a publication by one styling himself therein "editor," is not within the statute and, therefore, no evidence of the facts contained in it.
9. *Averment of service in judgment entry.* An averment of due publication of a summons in a judgment entry which appears from the whole record to be untrue or is not affirmatively supported by the facts contained in such record, is a nullity and may be disregarded.
10. *Presumptions in favor of jurisdiction do not apply where defendant only constructively served.* The common law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record or general jurisdiction had its origin in the fact that at common law no judgment could be given against

a defendant until he had appeared in the action, but no such presumption does or ought to apply in cases where the defendant is a non-resident and there was no appearance and only constructive service of the summons by publication.

DEADY, *J.*

This action is brought to recover the possession of a half-section of land situate in Multnomah county, the same being donation claim 57.

It is alleged in the complaint that the plaintiff is a citizen of California, and the owner, and entitled to the possession of the premises, which are worth $15,000; and that the defendant is a citizen of Oregon and wrongfully withholds the possession of the premises from the plaintiff.

The answer of the defendant tacitly admits the citizenship of the parties and the value of the premises as alleged in the complaint, but denies the ownership of the plaintiff and his right to the possession of the premises, and sets up a title thereto in himself. The defence of title in the defendant is controverted by the reply.

By consent of parties the cause was tried by the court without the intervention of a jury, on September 24 and 25, 1874, and afterwards submitted on briefs.

On the trial the plaintiff proved that a patent to the premises was issued to him by the United States, on March 19, 1866, as a settler under the donation act of September, 27, 1850, and rested his case.

Thereupon the defendant offered in evidence duly certified copies of the complaint, summons, order for publication of summons, affidavit of service by publication and judgment in the action of J. H. Mitchell v. Marcus Neff in the circuit court for the county of Multnomah, wherein judgment was given against the defendant therein, on February 19, 1866, for the sum of $294.98; to the introduction of which papers the plaintiff objected, because: (1) said judgment is *in personam* and appears to have been given without the appearance of the defendant in the action or personal service of the summons upon him and while he was a non-resident of the state, and is, therefore, void; (2) said judgment is not *in rem*, and, therefore, constitutes no basis of title in the defendant; (3) said copies of complaint, etc., do not show jurisdiction to give the judgment alleged, either *in rem or personam;* and (4) it appears from said papers that no proof of service by publication was ever made, the affidavit thereof being made by the "editor" of the *Pacific Christian Advocate* and not by "the printer or his foreman or principal clerk." The court admitted the evidence subject to the objections.

The defendant then offered in evidence a certified copy of an execution issued upon said judgment on July 9, 1866, and the return thereon, from which it appears that the premises in question were sold upon said execution to satisfy said judgment, on August 7, 1866, to J. H. Mitchell for the sum of $341.60, to the introduction

of which papers the plaintiff objected, because the judgment in Mitchell v. Neff being given without jurisdiction, the execution was void, and further, that the notice of sale upon said execution and attached to the return was no part of either, and, therefore, should not be admitted. The court admitted the evidence subject to the objections.

The defendant then offered in evidence three papers purporting to be deeds to the premises to the defendant, the first being signed by Jacob Stitzel, sheriff of Multnomah county, by C. B. Upton, his deputy, on January 14, 1867, the second by said Stitzel, ex-sheriff of said county, on July 24, 1874, and the third by E. J. Jeffery, sheriff of said county, on July 21, 1874; to the introduction of which papers the plaintiff objected, because, as to the first one: (1) It was not made to the *purchaser* at the sheriff's sale; (2) It is not sealed, witnessed, or properly acknowledged as a deed; as to the second one: (1) There being no valid judgment proved, the instrument is no link in the chain of title; (2) It was not made to the *purchaser* at the sheriff's sale; and as to the third one, for the same reasons as in case of the second one, with the additional one: That it was not executed by the officer making the sale. The court admitted the evidence subject to the objections.

The defendant then offered in evidence an assignment by J. H. Mitchell to the defendant of the certificate of purchase of the premises, dated August 10, 1866; to the introduction of which the plaintiff objected, because: (1) There being no valid judgment the assignment is not evidence of title in the defendant; (2) If there were a valid judgment to support the sale to Mitchell the assignment would pass a mere equity to the defendant to enforce a conveyance from the former after he had received one from the sheriff, and, therefore, it is not evidence of title in the defendant. The court admitted the evidence subject to the objections.

The defendant having rested, the plaintiff offered in evidence a duly certified copy of the judgment roll in Mitchell v. Neff, which contained not only the complaint, summons, and other parts of the record of that case already introduced by the defendant, but also a copy of the affidavit of the plaintiff therein, upon which the order of publication was made; to the introduction of which the defendant objected, because said affidavit was not properly a part of the judgment roll. The court admitted the evidence subject to the objections.

Upon this evidence the right of the plaintiff to recover is admitted, unless by virtue of the sale of the premises upon the judgment in Mitchell v. Neff and the subsequent assignment of the certificate of purchase and the conveyances to the defendant, the legal title passed from the plaintiff to him.

Admitting that the proceedings in Mitchell v. Neff were duly taken according to the statute of the state in the case of non-resident

debtors, what was the effect or force of the judgment as against the person of the defendant or his property? It is admitted on all hands that such a judgment is not binding in personam.—(Story's Con. of Laws, § 539; D'Arcy v. Ketchum, 11 How., 174; Galpin v. Page, 18 Wall., 367.) And this rule is expressly declared in the Or. Code of C. P., § 506, as follows: "No natural person is subject to the jurisdiction of a court of this state unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached."

Neither is it claimed by the defendant that this judgment had any other or greater effect than to enable the plaintiff therein to subject this property to the payment of the debt owed him by Neff.

But the plaintiff maintains that the court, in M. v. N., could not acquire jurisdiction to reach the property of a non-resident or subject it to the payment of his debts, owed in this state, except by the actual seizure of such property contemporaneous with the commencement of the proceeding or before the rendition of the judgment therein.

In support of this position the case of Galpin v. Page, decided by Mr. Justice Field in the Circuit Court for the District of California, on August 31, 1874, is cited. In this case the learned judge, after showing that "The tribunals of one state have no jurisdiction, and can have none, over persons and property without its territorial limits," proceeds as follows: "But over property and persons within those limits the authority of the state is supreme, except as restrained by the Federal Constitution. When, therefore, property thus situated is held by parties resident without the state, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the state over the property would be defeated if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the states, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. * * * * A pure personal judgment, *not used as a means of reaching property at the time in the state*, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits, and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the state as to the liability of a party over whose person and property they had no control. The validity of the statute can only be sustained by restricting its application to cases where, *in connection with the process against the person*, property in the state is brought under the control of the court and subjected to its

judgment, or *where the judgment is sought simply as a means of reaching such property*, or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state."

But I see nothing in this language or the rule as there laid down, which supports or gives countenance to the position of the plaintiff, unless it be in the statement that the statute giving the right to proceed by publication against non-residents of the state is valid only when restricted "to cases where, in *connection* with the process against the person, property in the state is brought under the control of the court and subjected to its judgment."

Now the property was "brought under the control of the court and subjected to its judgment" in M. v. N., if at all, by the execution which issued upon the judgment. This process against the property of Neff was issued to enforce the judgment given in pursuance of the process against his person. The one was the inception and the other the completion of the proceeding, and so they were connected together as the links in a chain. Certainly, the process against the property could issue in *connection* with the process against the person without being exactly simultaneous with it. They were related parts of the same proceeding.

Besides, this judgment, though personal in form, was procured, intended, and used simply *as a means of reaching the property* of Neff then within the state, and according to the rule in Galpin v. Page, *supra*, is so far valid and binding.

34 But the power of the state over the property within its limits, of non-residents, being supreme, and it being admitted on all hands that the state may subject such property to such disposition by their tribunals as may be necessary to protect the rights of its own citizens," in my judgment, the *mode* of exercising this power is a matter for the state to determine. In the exercise of this power it may require that the proceeding be strictly *in rem*, and commenced by the seizure of the property, or it may, as provided in this state, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name—nominally—for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and then authorize the seizure and disposition of the property, so as to satisfy the same. In either case the final result is the same, while the latter mode of proceeding has this to commend it over the former, that it does not permit the seizure or interference with the property of the non-resident until the right or claim of the citizen in or to it is satisfactorily established.

Nor does it appear to me that the state is bound in any case to provide for giving n tice to the absent party by publication of the summons or otherwise. That matter pertains to the *mode* of proceeding over which the state has absolute control. The notice usually given is merely constructive, and in a large number if not a

majority of cases, gives no information to the absent party. Of course it is the duty of the state to deal justly and considerately with non-residents who have property within her jurisdiction, and, therefore, it should provide as far as practicable that no proceeding should be taken in her courts to affect such property, without notice to the owner.

It being shown that the state has the power to subject the property of non-residents to the payment of debts owing to her citizens, by such a proceeding as may by law be provided, including one in which such property is not seized prior to judgment, but thereafter, and then only for the purpose of satisfying said judgment, it remains to be considered whether the judgment in M. v. N. was given by a court having jurisdiction to do so according to the laws of the state.

The plaintiff maintains that the court acted without jurisdiction, because it appears from the record: (1) That the order of publication was made without evidence that Mitchell had "a cause of action against" Neff; or (2) That any diligence had been used to ascertain his "place of residence;" and (3) That the service of the summons was not proved, as by statute provided.

In the consideration of these objections two questions arise which must first be disposed of, namely: What constitutes a judgment roll, and is it the only part of the record of the court which may be inspected upon an objection to its jurisdiction?

As to what constitutes a judgment roll in this state there has been no decision by the supreme court of the state, and, therefore, this court must construe the statute on the subject for itself.

The code of C. P., § 269, provides that "the clerk shall prepare and file in his office the judgment roll," "if the complaint has not been answered by any defendant," by attaching "together in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment."

The law of the state, at the date of the proceedings in M. v. N., provided that whenever personal service cannot be made upon the defendant, and "after due diligence he cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, and in like manner it appears that a cause of action exists against the defendant," "such court or judge may grant an order" allowing constructive service to be made in the case, by publication of the summons, "among other cases, when the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action."—Code of C. P., § 55.

In the case of M. v. N. there was an order granted by the judge allowing service of the summons to be made by publication under this section. What, then, constitutes the proof of such constructive service, and is, therefore, a necessary part of the judgment roll? The question is not altogether free from difficulty, principally because § 69 of the Code, in prescribing what "proof of the service of

the summons" shall be, provides that, if served by the sheriff, his certificate thereof; if served by any other person, his affidavit thereof; and, "in case of publication, the affidavit of the printer or his foreman or his principal clerk, showing the same."

On behalf of the defendant it is maintained that § 69 limits the effect and scope of the phrase "proof of service," as used in § 269, to the affidavit of the printer touching the mere fact of publication of the summons in the newspaper. But, because the effect of the phrase is so limited in § 69—the "printer's" relation to and knowledge of the subject beginning and ending with the fact of such publication—it does not follow that the legislature intended it should be so understood and applied when used elsewhere in the Code, particularly when the natural signification of the words and the plain import of the context, as in § 269, require that it should be construed to include other facts than this one.

The judgment roll of the Code is a mere collection of papers and copies of entries in the case, sufficient, at least, to show a *prima facie* case of jurisdiction in the court, and the exercise thereof, until a final determination of the controversy, so far as the particular proceeding is concerned. As its name implies, it is the roll or record of the final determination or judgment, and not of the entire proceedings in the case. Among other things, the proof of service is directed to be placed in such roll, because, without it, it would not appear therefrom that the court had jurisdiction to give the judgment. But how does the mere affidavit of the printer as to the publication of the summons show a *service* of the summons? It cannot appear from such affidavit that any court or judge ever ordered publication of the summons, or, if so, in that particular paper or for that length of time. Such an affidavit may be made and filed in a cause and placed in the roll without any order for publication having been made, or, if there was one, without the publication proved by it being in any essential in accordance with it.

"The proof of service" in a judgment roll must, according to the natural signification of the words and the obvious purpose of § 269, include not only the fact of delivery or publication of the summons, but the authority to do so. In the case of service by a sheriff, his certificate of delivery to the defendant would not be sufficient proof of service, unless it contained evidence of his authority—that it was done in his official character; and so when the service purports to be by publication, it is not *proven*—shown, established until the authority to publish is proven, as well as the publication itself.

This proof—proof of service of the summons—the Code directs to be placed in the judgment roll as a part of it. What constitutes such proof depends upon the circumstances of the case. Where the service is by publication, it must include not only proof of the fact of publication in a newspaper, but the authority therefor. Nothing short of the order of the court allowing the publication will suffice for this purpose, and unless such order state that the facts neces-

sary to give jurisdiction appeared by affidavit, it should include the affidavit also. Admitting that an order for publication, containing the statements suggested, would be *prima facie* sufficient, yet the full and complete proof of the service should include the affidavit upon which the order was made.

The only authority cited which differs from this conclusion is Hahn v. Kelly, 34 Cal., 403, in which it was held that neither the affidavit for the order for publication nor the order itself were a part of the judgment roll, and that the only proof of service of the summons which it need contain is the affidavit of the printer to the fact of publication. The court admitted that "the proof of service by publication" should include the affidavit and order of publication, because "in point of law, they constitute a part of the mode" of such service, and this itself is sufficient reason why the statute should not have been so construed as to *exclude* them. In the same court the previous cases of Braly v. Seaman, 30 Cal., 610, and Forbes v. Hyde, 31 Cal., 342, were considered and decided upon the theory that the affidavit and order for publication were a necessary part of the proof of service and, therefore, a constituent of the judgment roll. "Counsel eminent for learning and ability," who argued these important cases, "assumed and, therefore, conceded that they were a part of the judgment roll;" and there can be no doubt that the rule first announced in Hahn v. Kelly was a wide departure from what had been understood and assumed by the bench and bar of that state to be the true construction of the statute.

In Galpin v. Page, *supra*, 21, Mr. Justice Field held that the proof of service must include the affidavit and order for publication. In considering the question he says: "Now, it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons making the service or publication, of which the sections immediately preceding in the same title speak, as if the language were as follows: 'Proof of the service of a summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows.' The obvious meaning intended is that the proof of service which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, *that an affidavit could be used to establish conclusively a fact to which it makes no reference.* Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication, to be of any avail, must be in a paper designated and for the period prescribed by the order of the court or judge. The terms of such order must, therefore, be connected with the affidavit or the proof will amount to nothing. The affidavit, by itself, is only a

portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit.

"When, therefore, the record of the judgment comes to be made up, it must necessarily include the order of the court, or it will disclose no proof of service. And when the statute requires the clerk to attach with other papers the proof of service, *it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also, without which the affidavit establishes nothing.* It is giving to the provision, declaring the proof which the officer or person making personal service or the printer publishing the summons shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error, in our judgment, was committed in Hahn v. Kelly. That the ruling in that case left the judgment roll a defective and imperfect record, seems to have been felt by the court, for it says: 'In our judgment it would have added to the completeness of the record to have made proof of service by publication include, also, the affidavit of the party and the order of the court directing the publication to be made, for, in point of law, they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it.'

"For the reasons we have stated, we do not admit that the statute sanctions any such defective record, but, on the contrary, we are clear that, properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment roll."

I am not advised what has been the practice in this state in this matter. In the case under consideration the roll does not contain the order for publication, but does contain the affidavit therefor. But the order having been put in evidence by the defendant may be considered, so far as he is concerned, a part of the roll. The roll itself is otherwise made up in utter disregard of the statute, the papers and entries comprising it being attached together pell-mell, without any reference to the order of their issuing, filing, or entry;" while some of them are motions for orders and judgments and the like, which are out of place.

The ruling in Galpin v. Page, *supra*, being made by a justice of the Supreme Court of the United States, is of more direct authority in this court than that in Hahn v. Kelly, while the reasons for it, to my mind, far outweigh those given in support of the ruling in the latter case. In my judgment there is scarcely a doubt that
35 the judgment roll, to show "the proof of service" must contain not only the proof of publication of the summons, but also the authority for such publication.

But the affidavit and order for publication may be inspected by this court for the purpose of ascertaining whether the court in M. v. N. had jurisdiction or not, upon another ground.

The judgment roll is not the *whole* of the record in M. v. N.

The record of the case comprises "a history of all the acts and proceedings in the action from its initiation to final judgment."—(Galpin v. Page, *supra*, 22.) A part of this record or history is at least all the papers filed in the case and upon which the court appears to have acted in any step of the proceeding. So are the entries and files containing the acts and doings of the court in the case. And these are are all *verities* in the same sense and in the same degree as those of them which by statute constitute the judgment roll. These are all elements of "the record at common law, which imported absolute verity," and the definition of a record contained in § 719 of the Code of C. P. is to the same effect: "A judicial record is the record, official entry, or files of the proceeding in a court of justice, or the official acts of a judicial officer in an action, suit, or proceeding."

There is nothing in § 269 prescribing how the judgment roll shall be made, which expressly or by implication makes it *the* record of the case, or that imparts to it any more or greater verity, than the rest of the record. As has been already remarked, the judgment roll is not the whole record of the case, but only a collection of such of the papers and entries as in the opinion of the legislature were necessary or sufficient to show a prima facie case of jurisdiction in the court to pronounce the *judgment*. The remaining portion of the record, which is often voluminous, is omitted from this roll on grounds of convenience and economy. For the same reason, I suppose, the roll is made up in part by attaching the original papers together instead of copying them upon parchment, as was once the case, or in a book, as is still the case in some states, and in this in particular cases.—(See § 270 Code of C. P.) There is really no ground for assuming that the legislature in providing for this brief judgment roll, intended to thereby exclude the rest of the papers and entries of the case from the record, and to take from them the force and effect as evidence to which they were otherwise entitled. In the very nature of things there is just as much reason and convenience in attributing absolute verity to an order for the publication of a summons as to the *ex-parte* judgment given in pursuance of it, in the same case and by the same court or judge; and it is not to be assumed, in the absence of express provision to that effect, that the legislature would make such an illogical and absurd distinction.

In considering, then, the objections made to the judgment in M. v. N., the court will inspect the affidavit and order for publication as well as the rest of the record, upon the double ground that they are properly a part of the judgment roll, and also a part of the general record of the case, and, therefore, in either case, of equal verity with any part of such roll. If, then, it shall appear from the record in the case that the court in M. v. N. never acquired jurisdiction to give the judgment it did, the sale of the premises and subsequent proceedings were void, and the plaintiff must recover.

This conclusion would follow upon general principles, and is within the rule expressly declared in § 731 of the Code of C. P., as follows: "Any judicial record may be impeached, and the presumption arising therefrom overcome, by evidence of a want of jurisdiction in the court or judicial officer, * * in respect to the proceedings."

To proceed, then, with the consideration of the objections: Was the order for publication of the summons made without evidence that Mitchell had "a cause of action" against Neff?

The affidavit of Mitchell upon which this order was made is dated November 13, 1865, and after the title of the cause, reads as follows: "I, J. H. Mitchell, pl'ff, being first duly sworn, say that the def't, Marcus Neff, is a non-resident of this state, that he resides somewhere in the State of California, at what place affiant knows not, and he cannot be found in this state. The plaintiff has a just cause of action against defendant *for a money demand on account.* That this court has jurisdiction of such action. That the defendant has property in this county and state."

The order was granted in open court, on the same date as the affidavit, and reads as follows: "Now, at this day comes the plaintiff in his proper person and by his attorneys, Mitchell & Dolph, and files affidavit of plaintiff and motion for an order of publication of summons, as follows:—'Now comes the plft. by his attys. and upon the affidavit of plft. herewith filed moves the court for an order of publication of summons against deft., as required by law—he being a non-resident;'—and it appearing to the satisfaction of the court that the defendant cannot after due diligence be found in in this state and that he is a non-resident thereof; that his place of residence is unknown to plff., and cannot with reasonable diligence be ascertained by him; and that plaintiff has a cause of action against defendant; and that defendant has property in this county and state, it is ordered and adjudged by the court that service of the summons in this action be made by publication for six weeks successively in the *Pacific Christian Advocate*, a weekly newspaper published in Multnomah county, Oregon, and this action is continued for such service."

The judgment in M. v. N. being now attacked or questioned collaterally, not on appeal, if there is *any* evidence in the affidavit tending to prove or establish the ultimate fact upon which jurisdiction to grant the order depends—the existence of a cause of action against the defendant—it is sufficient to sustain the judgment. But if there is no evidence of such fact, the court acted without authority and the judgment is void. I find the rule upon this subject laid down very fully and clearly by Mr. Justice Sawyer, in Forbes v. Hyde, 31 Cal., 348, as follows: "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the

former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. His order would in such case be reversed on appeal. But as there was jurisdiction to act, until reversed, or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. Such a judgment could not be collaterally attacked. If, however, there is a total want of evidence on any point necessary to be determined, upon which the law requires the mind of the judge to be satisfied as a prerequisite for granting an order of publication, then there is nothing upon which he is authorized to act; the evidence, which is the very basis of his jurisdiction, and upon which it depends, is wanting, and his action is without authority. His action is not merely erroneous, for there was nothing to call into exercise the judicial mind—there is no jurisdiction to act at all, and the proceeding is void."

There is nothing in the affidavit of Mitchell which tends to show that he had "a cause of action" against Neff. True, he asserts therein that he has a cause of action, but this is not the statement of a fact tending to prove such a proposition, but a general assertion or expression of opinion that the proposition is true. But it is the province of the court to determine that question, upon the facts to be stated in the affidavit. A general statement that the plaintiff has a cause of action against the defendant is not sufficient. It does not make the matter appear to the court. The facts necessary to show that a cause of action exists must be stated. Concerning the material circumstances of time, place, and amount, this affidavit is wholly silent, and whether this supposed cause of action arose upon an indebtedness of one mill for "a small measure of moonshine" or a million of dollars for as many miles of land, is left to conjecture. In Forbes v. Hyde, *supra*, 354, Mr. Justice Sawyer quotes with approval the following ruling upon this subject from Ricketson v. Richardson, 26 Cal., 153: "An affidavit which merely repeats the language or substance of the statute is insufficient. * * The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that *the plaintiff has a good cause of action against him*, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient, is

to strip the court or judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court, or judge, from the probatory facts stated in the affidavit, before the order for publication can be legally entered."

Of course, in stating that the affidavit contains no evidence of the existence of a cause of action against Neff, I consider the sense of the language of that instrument—"Plaintiff has a just cause of action against defendant *for a money demand on account*"—as in no degree affected by the words which I have italicised. The expression—"a money demand on account"—is, so far as my knowledge goes, *sui generis* in the literature of the law. What it means is not obvious, and counsel have not been able to enlighten the court upon the subject. If it means anything, it is an allegation that the affiant has a demand against the defendant "for money on account," which at least is a mere obscure amplification of what was already said in the averment that he had a cause of action against him.

So far then as the affidavit is concerned, it containing no evidence that the plaintiff had a cause of action against the defendant, the court acted without authority in making the order for publication, and the same, together with the judgment following it, is simply void.

But it is suggested that it appears from the verified complaint on file in M. v. N. when this order for publication was allowed, that a cause of action existed in favor of Mitchell and against Neff. The complaint states:—That the plaintiff is an attorney "and as such has been practicing in Portland, Oregon, for over five years last past. That between January 1, 1862, and May 15, 1863, plaintiff, at defendant's special instance and request, rendered professional services for defendant, as such attorney, which services were reasonably worth the sum of $209 in legal-tender notes; that said amount is long since due and unpaid, except $6.50 paid thereon by defendant, January 24, 1863, wherefore," etc.

While it is questionable whether even the complaint states facts sufficient to prove the existence of a cause of action, and, therefore, to justify the granting of an order for publication, if the question arose upon an appeal, it doubtless contains some evidence tending to establish that conclusion, and is, therefore, sufficient when the question arises, as in this case, where the judgment is attacked collaterally.

In Forbes v. Hyde, *supra*, 355, the complaint, which was not necessarily verified, was not in the record. The court was asked to presume that it was verified and contained evidence tending to show the existence of a cause of action, and that the court in allowing the order for publication may have acted upon it as well as the in-

sufficient affidavit. But it declined to do so, saying that "it affirmatively appears by the recitals in the order itself that the order was based upon the affidavits of Green and Brooks."

In M. v. N. the complaint is in the record, and appears to be verified. It is, therefore, as to the facts contained in it and relative to this inquiry, substantially an affidavit. The motion for the order for publication, which is recited therein, asks that it be made "upon the affidavit of plft. herewith filed;" but the order itself does not state that it was made exclusively upon the affidavit. It states that "it appearing to the satisfaction of the court," etc., without stating how or why. In a case like this there is no presumption that there was any evidence before the court allowing the order other than what appears by the record. But it appears from such record that the complaint was on file in the case when the order for publication was allowed, and was, therefore, before the court and might have been used by it in allowing the order as evidence that a cause of action existed against Neff. In U. S. v. Walsh, 1 Deady, 282, I held that the complaint in an action for a penalty was an affidavit and sufficient for the allowance of a writ of arrest under § 107 of the Code of C. P. The point is not free from doubt, but my mind inclines to the conclusion that this court ought to presume, if necessary, that the court in M. v. N. acted upon the evidence contained in the complaint in allowing the order, and, therefore, I conclude that, so far as this objection is concerned, the judgment is valid.

The second objection to the judgment is that it does not appear from the record that any diligence was used by Mitchell to ascertain Neff's place of residence. The fact upon which the objection is based is admitted by counsel for defendant, but they insist that it is not necessary that the affidavit upon which the order of publication was allowed should contain the evidence of such diligence; that the fact might be proved by oral testimony. The order merely states that it appears to the satisfaction of the court that the place of residence of Neff "is unknown to plaintiff, and cannot, with reasonable diligence, be ascertained by him." Upon what evidence this conclusion was reached by the court does not appear, except in the recital that the motion was made upon the affidavit of the plaintiff.

§§ 56 and 57 of the Code regulate the allowance of service of summons by publication, and ought to be taken and construed together. The latter provides that, "in case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, *unless it shall appear that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him.*"

The fact of diligence can only be shown by affidavit, and this must appear by the record.—(Cook v. Farrar, 11 Abb., 40; 13 How. Pr., 43; Hallet v. Righters, 16 Id., 43; Titus v. Relyea, Id., 373; Hyatt v. Wagenright, 18 Id., 248.)

The exposition of §798 of the Code of C. P. by defendant's counsel, to show that an affidavit could not have been used to prove "diligence" upon the application for the order, is unsound. On the contrary, such section expressly provides that an affidavit may be used on a motion. Indeed, I do not understand that the evidence of a witness can be heard on a motion otherwise than by affidavit. The application for the order for publication of the summons was a motion, and any evidence used in support of it should have been an affidavit, and doubtless such was the case.

Besides §§ 56 and 57, taken together, by necessary implication, require that the proof of residence and diligence shall be by affidavit. In construing the corresponding sections in the California Code, the court, in Ricketson v. Richardson, 26 Cal., 152, said:

"Sections 30 and 31 treat of the same general subject, and they must be read together for the purpose of ascertaining what the affidavit and order should contain, in order to satisfy the law and make the service complete. It must appear from the affidavit that the person upon whom service is to be made either resides out of the state or has departed from the state; * * * and also whether his residence is known, and, if known, it should be stated. * * * The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and, if known, the residence must be stated. It is true that this is not required in terms in the thirtieth section, which is more especially devoted to the affidavit, but, as we have already said, the whole statute on the subject of service by publication is to be read together, and section 31 requires that where the residence is known the order shall direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. *In granting the order, the court or judge acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant.* There is no other way of bringing the fact of residence to the judicial knowledge of the court or judge. *That the fact of residence should appear in the affidavit is, therefore, necessarily implied from the whole tenor and scope of the statute.* * * * * * * * *

Where this kind of service is sought, the proceedings should be carefully scrutinized and strict compliance with every condition of the law exacted; otherwise its provisions may lead to gross abuse, and the rights of person and property made to depend upon the elastic consciences of interested parties, rather than the "enlightened judgment of a court or a judge."

The evidence of diligence used to ascertain the residence of the defendant, when it is alleged to be unknown to the party making the application, must appear in the affidavit, for the same reason that "the fact of residence" should, if known to such party. The one is the equivalent of the other. Either the place of residence of the defendant must be shown or it must appear that it is unknown

to the party and what diligence he has used to ascertain it. They are in the same category, and the law which requires one to be shown by affidavit equally applies to the other. It was not intended that the law should be a means of *spoiling* non-residents, and, therefore, it provides that the defendant shall have personal notice of the proceeding if possible, so that he may take proper measures to protect his rights. The provision requiring a copy of the summons and complaint to be mailed to the address of the defendant is a wise and just one, and well calculated to prevent its abuse. Little chance has a non-resident to be informed of the proceedings against him by the mere publication of the summons, often, as in this case, in a weekly newspaper of denominational circulation within the state, and practically none without it.

The court having omitted to make the order directing a copy of the summons and complaint to be deposited in the post-office, addressed to the defendant at his place of residence, upon the mere allegation in the affidavit that such place of residence was somewhere in California," *then* unknown to the affiant, and without any evidence that the plaintiff had ever used any diligence to ascertain such place of residence, or even that he was not conveniently and intentionally ignorant of the fact, the order allowing service by publication, and the service and judgment following it, are necessarily void and of no effect.

The third objection to the judgment is also well founded. There was no legal proof of the service of the summons by publication, and, therefore, the court had no jurisdiction to give the judgment. As has been stated, § 69 of the Code of C. P. requires that the service of the summons *shall be proved*, in case of publication, by the "affidavit of the printer or his foreman or his principal clerk." As appears from the affidavit to the publication, it was made by Henry C. Benson, the "editor" of the paper. The statute is imperative, and admits of no proof of service but the affidavit of the printer or his foreman or principal clerk. The reason is obvious. The persons described are the only ones who, as a rule, are likely to have personal knowledge of the fact, by virtue of their relation to the subject. It may be in some cases that the editor has such knowledge also. So it may have been in M. v. N., but if it were so it should have been stated. But, as a rule, the contrary is probably true. One of the elementary rules of evidence is, that a fact shall be proven by the best evidence of which, in its nature, it is susceptible. For very cogent reasons this rule ought to be rigidly applied to the proof of jurisdictional facts, where the proceeding is *ex-parte*. An editor does not know, *by virtue of his employment as such*, that a summons has been published in all the numbers of the paper he edits, put in circulation during a particular period of time. But the printer may be reasonably presumed to. Therefore the editor's affidavit is not the best evidence of the matter. True, he may inform himself concerning it, and so may any one having no relation

whatever to the paper. But speaking from information derived at second-hand in this way, the witness is liable to be mistaken or imposed upon.

For these very sufficient reasons, as it appears to me, the legislature has required that the service by publication shall be proven by the best evidence of which the case is susceptible—the affidavit of the printer, his foreman, or principal clerk. This being so, no court is authorized, for any reason, to assume that the affidavit of an editor or other person not the printer of a paper, is legal evidence of a publication therein.

But counsel for defendant maintain that due service of the summons appears from the entry of judgment, which states "that the defendant had notice of the pendency of the action, by publication of the summons for six successive weeks in the *Pacific Christian Advocate*."

What is meant by the averment, "that the defendant had *notice* of the pendency of the action," is not clear. The averment is without the statute, which does not provide that the defendant shall have *notice* of the pendency of the action by publication, but that constructive service of the summons may be made upon him by that means. Whether he thereby acquires actual notice of the proceeding the court cannot know and, therefore, cannot find. The averment should be that the defendant was duly served with summons, by publication of the same in the *P. C. A.*, etc. But, assuming that this averment is formally sufficient, it does not appear to be true in point of fact. The record not only fails to support it, but actually contradicts it. So far as the record discloses the fact, there was no evidence before the court that the defendant had any notice of the pendency of the action by a publication of the summons. The affidavit of the editor of the *P. C. A.* was not competent evidence of the fact, and none other appears to have been before the court.

And, finally, it is insisted by counsel for defendant that the court, in M. v. Neff, was a court of general jurisdiction and, therefore, the law presumes its proceedings were regular and within its power, unless the contrary affirmatively appears from the record.

Admitting for the moment that this rule applies in cases of this kind, it is a sufficient answer to say that the contrary does appear here from the record. If the record of a court is silent as to a jurisdictional fact, for the purpose of upholding the judgment, it will be presumed that the fact was duly made to appear to the court, but when it appears from the record that such a fact was made to appear by a certain means, it will not be presumed that it was also made to appear otherwise or differently. Here the record shows that the proof of service was made by the affidavit of the editor, and there is no room to presume that it was otherwise or differently made. The record is not silent on the subject. It speaks for itself, and there is no reason or necessity for resorting to presumption. Moreover, in this class of cases it is not sufficient that an

averment of due service of the summons in the judgment entry should be *not* in conflict with the facts contained in the record,—*it must be affirmatively supported by them.* If such an averment could be successfully substituted for the proof of the fact, which the statute requires, it is reasonable to suppose that the proof would generally be dispensed with. The averment is a nullity.

But I am satisfied, upon both reason and authority, that the rule in regard to presumptions in favor of the regularity of proceedings in courts of general jurisdiction does not and ought not to apply in cases where there is no appearance or actual service of the summons, and the defendant is a non-resident of the state. This presumption is a rule of the common law. It had its origin in, and is only applicable to, a procedure in which judgment could not be given against a defendant, unless he was not only personally summoned, but was arrested or appeared in the action. If he did not appear, his goods and the profits of his lands might be distrained *ad infinitum* to compel an appearance, or, if he absconded, he might be outlawed, but no judgment could be given against him in the action until he appeared and was heard.—(3 Black. Com., 280 et seq. See Hess v. Cole, 3 Zab., 116.)

The court being without jurisdiction to proceed in the action until both parties were before it, and each had an opportunity to allege what he might for himself and against his adversary, it might well be presumed that its judgment was regularly and duly given, unless the contrary affirmatively appeared by the record. Such is still the rule in regard to courts of general jurisdiction, when proceeding substantially according to the course of the common law.

But the proceeding in M. v. N., so far as the acquiring of jurisdiction is concerned, was in fact and theory *ex-parte.* The record was made by the plaintiff without the knowledge or interference of the defendant. He was not present to question the jurisdiction of the court, or point out wherein the facts stated or shown by the plaintiff were insufficient to authorize its action, The action of the court in the premises in such cases is only formal. Technically it gives the judgment, but substantially the proceeding and record are taken, conducted, and made up by the plaintiff upon his own judgment. No presumption ought to be allowed in favor of the jurisdiction in such cases. Every fact necessary to sustain the jurisdiction must appear from the record or the judgment is void. As was said by Mr. Justice Field, speaking for the court in Galpin v. Page, 18 Wall., 368: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was,
at the time of the alleged service, without the territorial lim-
37 its of the court, and thus beyond the reach of its process,
and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establish-

ing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

In Galpin v. Page, in the circuit court, *supra*, 7, it was held, citing the same case in 18 Wall., that "presumptions which the law implies in support of the judgment of superior courts of general jurisdiction" "were limited to jurisdiction over persons within the territorial limits of the courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law." And again, at p. 12: "When the judgment of such a court" (of general jurisdiction in civil cases) "is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction cannot ordinarily be assailed, except on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a court relates to a matter not falling within the general scope of its powers, and the authority of the court can only be exercised in a prescribed manner not according to the course of the common law; or *the judgment is against a party without the territorial limits of the court, who was not served within those limits and did not appear to the action, no such presumption of jurisdiction can arise. The judgment being, as to its subject-matter or persons, out of its ordinary jurisdiction, authority for its rendition must appear upon the face of its record.* In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number in the highest courts of the several states, and in the Supreme Court of the United States. There is running all through the reports the emphatic declaration of the common-law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the court. On this subject the cases speak a uniform language, with scarcely a dissentient voice."

But I do not understand that a mode of proceeding is "different from the course of the common law," in the sense in which that phrase is here used, because there may be a difference in mere non-essentials or incidents which change with the manners and circumstances of a people and their ideas of utility and convenience. As, for instance, whether a pleading is verified or not, or a denial is special or general, or a defendant shall answer without or after an

imparlance, or an issue shall be made by the complaint and answer, or by an indefinite series of pleadings or altercations if necessary, or whether there shall be many forms of actions or but one, or a judgment in ejectment shall be a bar to another action or not, does not, in this sense, make the mode of proceeding differ from the course of the common law. But, as has been shown, the corner-stone of a proceeding at common law was that no judgment could be given against a defendant unless he appeared in the action. Out of this important fact grew the reasonable presumption that the record was absolutely true, and the court had jurisdiction to give the judgment. But the law ceases with the reason of it. There is no reason for such a presumption when the proceeding takes place in the absence of the defendant upon a mere constructive service of process upon him. In such case the record must show affirmatively every fact necessary to give the court jurisdiction, and as to such facts it may be even contradicted, when attacked collaterally in the tribunal of another forum.—(Thompson v. Whitman, 18 Wall., 468.) This court, and the one that gave the judgment in M. v. N., are tribunals of different sovereignties, exercising a distinct and independent jurisdiction, though within the same territorial limits. The judgment of the state court is only entitled to the same faith and credit in this court as it is in the courts of another state.—(Galpin v. Page, *supra*, 10.)

I cannot better conclude this opinion than by quoting and adopting the language of Mr. Justice Sawyer in a similar case—Forbes v. Hyde, *supra*, 355:

"We are not insensible to the fact that this decision may affect many judgments obtained upon service by publication of summons in years past, and, for that reason, we have bestowed upon the question the attention which its great importance demands. We know that there is probably no state in which there have been, and where there is likely to be, so many occasions for procuring service by publication as in California. But while this is true, it is, doubtless, equally true that there is no state in which so many have waited and are still waiting for their adversaries to depart, in order that suit may be brought and judgment obtained against them on publication without actual notice. It may be important to the interests of those who suppose they have acquired rights under this class of judgments that they should be upheld. But it is equally important that the interests of parties, who have been only constructively served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too

late to protect himself. An appeal is no adequate remedy when a party has no notice, for the time to appeal is very brief, and may expire before actual notice is obtained. In the language of the court in Smith v. Rice, 12 Mass., 512, 'the very grievance complained of is that the party had no notice of the pending of the cause, and of course no opportunity to appeal.'"

There must be judgment for the plaintiff, and findings of fact and law will be prepared in accordance with this opinion.

J. W. Whalley, *M. W. Fechheimer*, and *W. W. Page*, for plaintiff.
H. Y. Thompson and *George H. Durham*, for defendant.

38 UNITED STATES OF AMERICA, } *ss.*
DISTRICT OF OREGON. }

I, Ralph Wilcox, clerk of the Circuit Court of the United States for the District of Oregon, hereby certify that the foregoing is a correct copy of the opinion delivered by the court in said cause.

Witness my hand and the seal of said court hereto affixed, this first day of March, A. D. 1877.

[SEAL.] RALPH WILCOX, *Clerk.*



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1877.

SYLVESTER PENNOYER, PLAINTIFF IN ERROR,

vs.

MARCUS NEFF, DEFENDANT IN ERROR.

(No. 669.)

ERROR TO THE U. S. CIRCUIT COURT, DISTRICT OF OREGON.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1877.

SYLVESTER PENNOYER, PLAINTIFF IN ERROR,

vs.

MARCUS NEFF, DEFENDANT IN ERROR.

(No. 669.)

ERROR TO THE U. S. CIRCUIT COURT, DISTRICT OF OREGON.

STATEMENT OF THE CASE.

This action was brought by the Defendant in Error, Marcus Neff, a citizen of the State of California, against the Plaintiff in Error, a citizen of the State of Oregon, in the Circuit Court of the United States, District of Oregon, for the recovery of a tract of land situated in Multnomah County, Oregon, of the alleged value of $15,000. The answer of the plaintiff in error tacitly admitted the citizenship of the parties, and the value of the premises, but denied the ownership of the said Neff and his right to the possession of said tract of land, and sets up a title thereto in himself, which defense of title was controverted by Neff.

By consent of parties, and in pursuance of their written stipulation filed in the case the cause was tried without the intervention of a jury, and a special verdict or finding of facts by the Court, was rendered in the case.

Marcus Neff claimed title to the property in controversy by virtue of a patent of the U. S. issued to him on March 19th, 1866, as a settler; under the Donation act of Sept. 27th, 1850. The plaintiff in Error, Sylvester Pennoyer, (defendant in the lower court) claimed title to the property in controversy by virtue of a judgment against said Neff rendered by the Circuit Court of the State of Oregon, for the County of Multnomah, in an action wherein J. H. Mitchell was plaintiff and said Marcus Neff was defendant; and by virtue of an execution sale and Sheriff's deed for said premises, under said judgment.

In the said action of Mitchell vs. Neff in the Circuit Court of Oregon, jurisdiction of the defendant, Neff, was obtained by service of summons by publication, as provided by statute. In the court below (U. S. Circuit Court) objections were taken to the sufficiency of the affidavit upon which the order for publication of

summons was made, and to the proof of publication of summons; and the principal, if not only questions were: 1st. Whether the State Court acquired jurisdiction to make the order for publication of summons. 2d. Whether the said court had jurisdiction to render the judgment in case of Mitchell vs. Neff.

From the special findings of facts by the court below—(see printed record, pages 6 and 7)—it will appear that preliminary to the rendition of said judgment every step required by statute to procure service of summons upon a non-resident, defendant, had been taken, namely: complaint was filed, summons was issued, affidavit for publication of summons was made, order for publication of summons containing recital of all facts necessary to give the Court jurisdiction to render the order was granted, proof by affidavit that publication of the summons had been made according to the requirements of the order followed by the rendition of the judgment in the said action of Mitchell vs. Neff; that the affidavits mentioned were laid before the Court and each considered and their sufficiency adjudged upon by it; that execution was duly issued upon said judgment and the premises in controversy sold thereunder; that as the assignee of the purchaser at the Sheriff's sale the said Pennoyer received the Sheriff's certificate of sale and subsequently the Sheriff's deed for said land, and entered upon the possession of the same January 4th, 1867. and so peaceably remained until September 10th, 1875, when the said Neff brought this action of ejectment against him in the United States Circuit Court for the District of Oregon.

To be more specific as to the facts showing jurisdiction of the court, the record in the action of Mitchell vs. Neff, show the following proceedings, in the order here stated, as will fully appear from the special findings of facts, viz:

1st. Complaint of J. H. Mitchell vs. Marcus Neff, for the recovery of $253.14 claimed to be due and owing to plaintiff and for which judgment is sought. Filed Nov. 3d, 1865.

See 2d finding of fact in printed record, page 6.

2d. Affidavit for publication of summons was made and filed 13th Nov. 1865.

See 4th finding of fact in printed record, page 7.

The affidavit upon which the order for publication of summons was made is as follows:

"I, J. H. Mitchell, pl'ff, being first duly sworn, say, the def't, Marcus Neff, is a non-resident of this State; that he resides somewhere in California, at what place affiant knows not, and he cannot be found in this State. The plaintiff has a just cause of action against defendant for a money demand on account. That this court has jurisdiction of said action. That the defendant has property in this county and State."

See printed record, p. 7.

3d. Order for publication of summons including motion therefor.

See 4th finding of fact in printed record, page 7.

The order of the court, based upon said affidavit is in the following words:

"Now, at this day, comes the plaintiff, in his proper person, and by his attorneys Mitchell and Dolph, and files affidavit of plaintiff and motion for an order of publication of summons as follows: 'Now comes the pl'ff by his att'y and upon the affidavit of pl'ff herewith filed, moves the court for an order of publication of summons against def't as required by law—he being a non-resident.'—And it appearing to the satisfaction of the court that the defendant cannot, after due diligence, be found in this State, and that he is a non-resident thereof; that his place of residence is unknown to plaintiff and cannot, with reasonable diligence, be ascertained by him, and that plaintiff has a cause of action against the defendant, and that defendant has property in this county and State; it is ordered and adjudged by the court that service of the summons in this action be made by publication for six weeks successively in the *Pacific Christian Advocate*, a weekly newspaper published in Multnomah County, Oregon, and this action is continued for such service."

4th. Proof of publication of the summons in the *Pacific Christian Advocate* for the time and in the manner required by the order of the court.

See 4th finding of fact in printed record, page 7.

5th. Rendition of Judgment 19th Feb. 1866, in favor of plaintiff J. H. Mitchell vs. Marcus Neff for $258.18 and $36.80 costs.

See 2d finding of facts in printed record, page 6.

That the entry of judgment contained the following averments:

"And it appearing to the court, that the defendant was at the time of the commencement of this action and ever since has been a non-resident of this State, and that defendant had notice of the pendancy of this action by publication of the summons for six successive weeks in the *Pacific Christian Advocate*, a weekly newspaper of general circulation, published in Multnomah County, State of Oregon, the last issue of which was more than twenty days before the first day of this term."

See 4th finding of fact printed record, page 7.

As a conclusion of law, the lower court in the trial of this action, held "That said Circuit Court of Multnomah county never acquired jurisdiction to make an order for the publication of the summons in the action of Mitchell vs. Neff, or to give any judgment therein against said Neff or the premises aforesaid, or upon which said premises could be lawfully seized or sold."

See 2d conclusion of law, printed record page 8.

All the other conclusions of law found by the court, were subsidiary to this, and indeed based upon it. The court thus held that the judgment in the said action of Mitchell vs. Neff in the State Circuit Court was void for the want of jurisdiction, and rendered judgment for the said Neff for the two reasons in substance as follows:

1st. Because the affidavit before the State Circuit Court upon which the publication of summons was ordered, was insufficient and did not authorize said court to make said order therein, and that said court erred in acting thereon.

2d. Because the State Circuit Court for Multnomah County erred in acting upon the affidavit of publication of summons as a legal and proper one, which affidavit, in the opinion of the United States Circuit Court, was irregular and illegal, and that there was no legal proof of the service of the summons by publication; for which two reasons the United States Circuit Court declared said judgment rendered in the State Circuit Court against the said Neff to be void and of no effect.

To the above ruling of the United States Circuit Court, we do make the following specific .

ASSIGNMENT OF ERRORS:

1st. The Court erred in holding that the affidavit upon which publication of summons was ordered in the State Circuit Court was insufficient and did not authorize said court to make said order therein.

2d. The Court erred in holding and deciding that the State Circuit Court of Oregon acquired no jurisdiction by virtue of the affidavit therein filed to make and render the order for the publication of the summons in the said action of Mitchell against Neff, or in other words, the error of the Court consisted in its assuming the appellate and revisory power to pass upon collaterally the same affidavit passed upon judicially by the State Circuit Court and to set aside the judgment for either supposed or real errors in the judicial findings in the State Court.

3d. The Court erred in holding that the proof of the publication of summons was not made according to law.

4th. The Court erred in holding and deciding that the State Circuit Court had no jurisdiction in the said action of Mitchell against Neff to render the judgment therein against said Neff.

5th. The Court erred in rendering judgment in favor of said Neff against Plaintiff in error for the recovery of the premises in controversy, and in disregarding the Statutes of Oregon, which guarantees that the title to property sold upon execution issued on

such judgment to a purchaser in good faith shall not be affected by subsequent proceedings setting aside such judgment.

We hold as propositions of law:

1st. That the State has the power to subject the property of non-residents within its territorial limits to the satisfaction of the claims of its citizens against such non residents by any mode of procedure it may deem proper and convenient under the circumstances.

Galpin vs. Page, 3d Sawyer 110.

Thomas vs. Mahone, 9th Bush (Ky.) 111.

2d. That under the laws of the State of Oregon, it is not required that such property should be attached in the first instance in order to give the Court jurisdiction, but a judgment may be rendered against a non-resident defendant upon substituted service as a means of reaching property situated at the time within the State or effecting some interest therein.

Oregon Code, §55 and 56, p. 116—quoted subsequently.

Oregon Code, §57, page 116–117.

Oregon Code, subdivision 4 of §246, page 155.

3d. That when the judgment of a court of general jurisdiction is produced in evidence, it cannot be attacked collaterally when the averment of necessary jurisdictional facts appear affirmatively upon the record, no matter how erroneous the judgment may be as to the matter adjudicated.

McCauley vs. Fulton, 44 Cal. 335; 34 Cal. 402; 35 Cal. 533; 36 Cal. 695; 37 Cal. 462; 38 Cal. 435; 43 Cal, 643.

Galpin vs. Page, 18 Wall 366.

Cornell vs. Williams, 20 Wall 249.

Voorhees vs. Bank &c., 10 Peters 475.

Thompson vs. Tolmie, 2 Peters 166.

4th. That when a judgment of a court of general jurisdiction is produced in evidence, and when the record of a case shows affirmatively that the court adjudged upon the sufficiency of certain affidavits, and the record contains the averments of the necessary facts to give it jurisdiction, no court before which such judgment is produced collaterally has the right to again pass upon the sufficiency of such affidavits, or to determine that the facts were other or different than those found by the court and averred in its record.

Otis vs. The Rio Grande, 1 Woods 279, 593, and other authorities last above quoted.

5th. That in the record of Mitchell vs. Neff, the State Circuit Court of Oregon, being a court of general jurisdiction, and having jurisdiction over the subject of the action, was not required to embody in said record the evidence of the jurisdictional facts upon which it acted in making the order for publication of summons and rendering the judgment therein; and it must be conclusively

presumed that it had before it the evidence of every jurisdictional fact required by the statute, because the averments in the record so affirms it and there is nothing therein to contradict it.

6th. That under the statutes of Oregon, the facts necessary to authorize the making of an order requiring the publication of the summons against a non-resident, are only required to be shown by affidavit to *the satisfaction of the Court or Judge;* and that in such case it is not in the power of the U. S. Circuit Court, when the judgment of the State Circuit Court is brought before it collaterally, to rejudge the cause or to decide as to the sufficiency or insufficiency of any such affidavit upon which said State Court may have acted.

7th. That in the case of Mitchell vs. Neff, in the State Circuit Court, every step to acquire jurisdiction therein was taken in the cause as required by the statute, and the sufficiency of the same was conclusively adjudicated by the court and its judgment cannot be impeached collaterally. 1st. Because the record shows jurisdiction. 2d. Because to do so would be to review the judgment of a court of competent jurisdiction as to the facts before it giving it jurisdiction, or in other words, it would be reviewing its judgment, and determining that the facts found by it and upon which it acted, were not true or were not sufficient to give it jurisdiction.

8th. That from the facts in this record it appears that Plaintiff in error was a purchaser in good faith of the land in controversy sold upon execution issued on a judgment rendered against Neff upon publication of summons, and under the statutes of Oregon a title thus obtained shall not be effected even though the judgment afterwards be vacated and annulled.

See Section 57, Stat. Oregon, 116, 117.

BRIEF AND ARGUMENT.

The first error we assign is, that the court below erred in holding that the affidavit upon which publication of summons was ordered in the State Circuit Court was insufficient and did not authorize said court to make said order therein.

We maintain that the affidavit was substantially sufficient and a compliance with the provisions of the statutes of Oregon; but that the matter may fully appear, we will specifically refer to the affidavit and to the provisions of the law.

The statutes of Oregon, relating to publication of summons was, at the time of the commencement of such suit, as follows:

§ 55. When service of the summons cannot be made as prescribed in the last preceding section, and the defendant, after due diligence, cannot be found within the State, and when that fact

appears, by affidavit, to the satisfaction of the court or Judge thereof, and it, in like manner, appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, such court or Judge may grant an order that the service be made by publication of summons in either of the following cases * * * * * *

3. When the defendant is not a resident of the State but has property therein and the court has jurisdiction of the subject of the action.

§ 56. The order shall direct the publication to be made in a newspaper published in the county where the action is commenced, and if no newspaper be published in the county, then in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge, shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant, at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State shall be equivalent to publication and deposit in the post office. In either case, the defendant shall appear and answer by the first day of the term following the expiration of the time prescribed in the order for publication, and if he does not, judgment may be taken against him for want thereof. In case of personal service out of the State the summons shall specify the time prescribed in the order for publication.

It will be seen from section 55 above quoted, that the power of the court to grant an order that the service of the summons be made by publication exists in all cases where it is made to appear to the satisfaction of the court or judge that the service of the summons cannot be made personally upon defendant, and the defendant, after due diligence cannot be found within the State, and it in like manner appears that a cause of action exists against the defendant and that the defendant was not a resident of the State but has property therein, and the court has jurisdiction of the subject of the action.—Everything required by this section of the statute is to be found set forth in the affidavit produced in the record.

The affidavit contained the averment of every fact required by the Statute, to be made to appear to the satisfaction of the court or Judge, though it may be held insufficient in not stating those facts with sufficient particularity.

The defendant Neff, was a non-resident of the State and resided somewhere in California—he could not therefore be found within

the State. And from the affiidavit as well as the complaint on file, which had been duly verified, it sufficiently appeared that Mitchell had a cause of action against the defendant Neff, to-wit: for a money demand on account. The statute does not require the circumstances of time, place and amount to be shown by affidavit —but simply the bare fact that a cause of action exists. And surely the complaint on file, together with the affidavit, would be sufficient evidence to the court and a compliance with the statute.

Such a demand—a money demand on account—has always been a valid and sufficient cause of action at common law.

The affidavit further avered that "the court had jurisdiction of said action;" and that "the defendant had property in this county and State." The court then had jurisdiction of the subject of the action; and the property was within the jurisdiction of the court.

The subsequent section 56, above quoted, is directory to the court as to the making of the order for the publication of summons, when and how to be published, and for what length of time. In that section it is provided that "in case of publication the court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office directed to the defendant at his place of residence, unless it shall appear that his residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him."

It will be observed that this is a negative proposition and hence as such, from the very nature of things, (unlike an affirmative proposition) is incapable of absolute demonstration and the court or Judge is required to determine whether such residence can reasonably be ascertained by the plaintiff. In the affidavit above quoted it expressly appears as a fact that the defendant Neff, resided somewhere in California, at what place affiant, Mitchell, knew not. The provisions of the Statute, section 56, does not provide as to how this fact may be made to appear to the court or Judge, and we have no right to conclude that the court did not logically arrive at the conclusion as satisfactory to itself from the facts stated in said affidavit, that the residence of said Neff was neither known to the plaintiff, Mitchell, nor could with reasonable diligence be ascertained by him.

The State of California, where the defendant, Neff, resided, and whose place of residence was unknown to plaintiff, was a large State in territorial extent, with a shifting population at that time—many of its citizens going from mines to mines and even to the contiguous Territories of Arizona and Nevada—and it is a very reasonable inference, from the facts then existing, that the court arrived at the conclusion it did, from even the statement of facts in the affidavit referred to. The court, with these facts before it, however, did arrive at the conclusion at the time of making the

order for publication of summons, and so held that the place of residence of said Neff is unknown to the plaintiff and cannot, with reasonable diligence, be ascertained by him. This conclusion of the court is embodied as an averment of facts in the order for the publication of the summons and it must be taken as true, and that the evidence of it was properly made to appear before the court. But section 55 above quoted, gave the court jurisdiction to make the order for the publication of the summons. And we hold that the affidavit quoted, *contained all the necessary facts therefor and that the court thereby did acquire jnrisdiction to make said order of publication.* That as to the provisions of section 56, the court having jurisdiction of the subject matter did judicially determine and decide the existence of the facts upon which it omitted to require a deposit in the post office of a copy of the summons and complaint to be directed to the defendant at his place of residence because it appeared to the court that, *that place of residence "was unknown to plaintiff nor could with reasonable diligence be ascertained by him."* This judicial determination by the court upon the facts before it, as to whether or not the defendant's residence could be found with reasonable diligence, is as final and conclusive upon all courts, except those clothed with appellate and revisory powers, as its determination upon any other question legally before it. This last view of the error assigned, however, will more properly come, and be embodied, under the second and fourth assignment of errors which we will consider together, and hence we will proceed to a consideration of the 3d error.

THE THIRD ERROR.

Section 60 of the Oregon Code requires that the service of summons shall be proved, in case of publication, by "*the affidavit of the printer or his foreman, or his principal clerk.*" The affidavit, in this case, was made by Henry C. Benson, who styles himself "Editor of the Pacific Christian Advocate." The State Circuit Court, in the proceedings of *Mtichell vs. Neff*, with this affidavit before it, and after having duly considered the same, avers in its judgment entry "that the defendant had notice of the pendency of this action by publication of the summons for six successive weeks in the Pacific Christian Advocate, a newspaper of general circulation, published in Multnomah County, State of Oregon, the last issue of which was more than twenty days before the first day of this term," which averment was made, by virtue of the proof of publication then before it. And now let it be observed, that this averment in the judgment entry, stands unimpeached by anything in the records of the case, and is therefore an absolute verity. To be sure, the Federal Court, in reviewing the proceedings of the State

Court, interprets the word "Editor," to be contra-distinguished from that of "printer," and by virtue of that interpretation, makes the ruling that "the record not only fails to support it (the judgment entry) but actually contradicts it." There is nothing in the record to contradict the averment in the judgment entry that the defendant had notice of the pendancy of the action by publication of the summons. On the other hand, however, there was before the court the evidence, from the printed slip, cut from the columns of the *Pacific Christian Advocate* and attested to by Henry C. Benson, Editor, that said publication had been made. And even interpreting "Editor" to be contra-distinguished from "printer," we do hold that the Federal Court would not have been justified in ruling that the defendant had not had notice of the pendency of the action by publication of the summons because such ruling would have been in defiance of the averments contained in the judgment entry. It is to be presumed that the State Court before which this affidavit was laid was sufficiently conversant with the use and meaning of the words and the universally accepted rules of interpretation to interpret the word "Editor" as attached to the name of the person making the affidavit of publication to be synonymous, or practically so, with that of "printer" or publisher according to the meaning and intent of the law, and hence the averment in the judgment entry that notice had been had by the defendant of the pendency of the action by the publication of the summons.

The Statutes of Oregon provide as follows, (Sec. 697 Oregon Code, page 250): "There are certain facts of such general notoriety, that they are assumed to be already known to the court, of those facts, evidence need not be produced."

Sec. 698. "The true signification of all English words and phrases, and all legal expressions."

If the argument of the Federal Court is good, that there had been no notice by the defendant *because* the affidavit was made by the "Editor" and not the "printer," then the analagous argument is good, in circumvention thereof, and that is, that *because* the judgment entry avers that there had been notice, therefore the Editor was the printer. But we do not have to rely on such logic as this to maintain our cause. The old farmer, who, having horses in an adjacent county, had written to his agent to have the horses shod by a "*blacksmith*," and to have the blacksmith send a letter to him informing him of the fact after they had been so shod, and who, having received a letter signed "John Jones, *horse-shoer*" so informing him of the fact, declared to his friends that he had therein the proof that the horses had never been shod, because it was signed by a "horse-shoer" instead of a "blacksmith," pursued the same method of argumentation which the court pursues, which

concludes that the record shows that the defendant did not have notice of the pendancy of the action by the publication of the summons because the affidavit was signed by the "Editor" instead of the printer. Such an argument needs no answer. The meaning and effect of the averment in the judgment entry, was that the defendant had constructive notice of the pendancy of the action by the publication of the summons as required by the order of the court, and it was an adjudication that it had been so published.

There is, therefore, nothing in the record of the case to controvert the averment of the judgment entry that "the defendant had notice of the pendancy of the action by the publication of the summons" and "it is to be presumed that no court will state, of record, the existence of facts which had no existence, or pass a decree or render a judgment unless proof of service of notice was actually produced. The record therefore stating such facts and nothing to the contrary appearing, it should be received as evidence of their existence."

Reddick et al. vs. the State Bank, 27 Ill., 145.

We now propose to show that the State Court, in interpreting the words "Editor" and "printer" to be synonymous, is sustained by the facts in the case, and by all the well-accepted rules of interpretation. In the first place, the term "Editor," in the English language, is but of comparatively recent origin and formerly it was purely synonymous with the word printer (*a*); that it was almost exclusively so used in this country as late as the Revolutionary War (*b*) and that this held true, to a greater or less extent until the great revolution in the newspaper business, by the introduction of steam power-presses, some thirty years ago, and that to this day, in the rural districts of this country and with weekly newspapers of limited circulation the *Editor is the printer, i.e. the publisher of the paper* and that, therefore, in such cases the two designations are synonymous. And this leads us to consider the word "printer" in the statute and bring to its interpretation some old and well-established rules. Section 60 of the Statute of Oregon provides that "proof of the service of the summons, or the deposit thereof in the post office, shall be as follows" * * "In case of publication, the affidavit

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(*a*)

"As put case, some well minded *printer*, (as one of the Stephens) is willing to be at an excessive charge, in a fair publication, of a learned and useful work, for the benefit of the present and following ages; it is most just that he should, from the hands of princes and States receive a privilege for the sole impression; that he may recover, with advantage the deep expense which he hath been at; otherwise some interloper may perhaps underhand fall upon the work, at a lower rate, and undo the first *Editor;* whose industry, care and cost shall be thus recompensed with the ruine of himself and posteritie."—*Bishop Hall, cases of Conscience, Dec., case* 5.

(*b*)

"Observe also, that as late as the Revolutionary War there was no distinction between *Editor* and *printer* in the colonies. There were no *editors* who were not *printers;* and no such thing as paying for editorial labor. Contributors, too, addressed 'Mr. Printer,' and not 'Mr. Editor,'"—*Parton's Life of Franklin, Vol. I., page* 111.

of the printer *his* foreman, or *his* principal clerk, showing the same." This statute is copied from the New York Code, and in that code it was introduced about thirty years ago, (1848) and to arrive at a correct interpretation, we shall have to ascertain the use of the word printer at that time. In the first place, it is apparent that the word "printer" in that statute, does not designate the person who is termed "printer" in the parlance of to-day, *i. e.*, the type-setter. For at that day the type-setter was designated as "journeyman printer" or a "journeyman," and besides to so interpret it would lead to the absurdity of assuming that the "printer" *i. e.* the "type-setter" employed the foreman, whereas it is well known that the foreman employs the printer, and would also lead to the absurdity of assuming that the printer employs the principal clerk, whereas it is well known that such a person is employed by the publisher. Such an interpretation, therefore, is contrary to a well-established rule and must, therefore, be rejected. "Every interpretation that leads to an absurdity ought to be rejected."

Vattel b, 2 chap. 17. Blackstone, Book I., p. 60.

Another well-established rule is that "the common usage of words at the time of their enactment, is the true criterion by which to determine their meaning. Hence, in order to correctly interpret ancient statute, the court should endeavor to ascertain the sense of the words according to their common usage at the era of their enactment."

Vattel, §483.

The provisions of the statutes of Oregon applicable to this case and herein quoted, and relating to the manner of commencing and prosecuting actions at law, were taken word for word from the New York Code of 1848 and adopted by the Territorial Legislature of Oregon in 1853, and has been continued ever since; and as we have had no judicial interpretation of the word "printer" by the appelate court of this State, it is but right and proper to continue it in the sense in which it was used and understood at the time of its adoption. Its primary meaning then, was *publisher;* and inasmuch as the primary meaning of *Editor* was and is *publisher*, we may properly use the one word for the other. "Two things each of which are equal to the same thing are equal to each other."

As we have shown, in the earlier era of the country, the "printer" of a paper was the "publisher," and that at that time, he was also "Editor" as well as publisher, and that use of the word was general until the introduction of improved methods of printing and a consequent subdivision of labor, since which a distinction has arisen, and is becoming gradually more marked as the immense issues of city journals are supplementary to the once widely scattered issues of country weeklies. By the context of the word

"printer" in the statute, as well as reverting to the usage of the term at the time of its first enactment, it is conclusive that the word *printer* is to be interpreted as *publisher*, and as such, *it must be interpreted in its broadest and most comprehensive sense, for the reason, that when 'printer' was so used, it designated the publisher.*

The court, in its opinion, (p. 29) has stated a fact (which fact however it discovered entirely outside of the record) which may aid us in properly construing the word "Editor" conformably to the facts of the case as well as to the rules of law. The court states the fact that the Pacific Christian Advocate is "a weekly newspaper of denominational circulation within the State, and practically none without it." We therefore feel at liberty to state the fact (inside the record by a correct interpretation), that the Editor of the Pacific Christian Advocate *was* the publisher *i.e.* the printer (*a*). Indeed no other conclusion than this can be drawn from the facts furnished by the court. A weekly newspaper confined in its circulation to a considerable extent to its own particular denomination within a sparsely settled State like Oregon, and to the locality where published is not the kind of newspaper that would have been able to have employed publishers, editors, clerks, reporters, &c., but is of that class in which the Editor of necessity is the publisher of the establishment.

It is not only apparent that the word *printer* as used in the statute quoted above was synonymous with or meant the same as the word *publisher;* but it has been so held by a New York court in the interpretation of the word printer in the statute of New York, from which that of Oregon is a copy, and it should be so interpreted as the intention of our legislature in its re-enactment.

See Bunce vs. Reed, 16 Barber 350.

Another important fact worthy of consideration in this connection is this, that the location of the newspaper being in the same town and locality of the court, it is to be presumed that matters of local notoriety, universally true, such as the management of a local newspaper issued weekly in a sparse population, was within the personal knowledge, or might be taken notice of by the court—

(*a*)
Following is an extract from the valedictory of H. C. Benson, entitled "Parting Words," published in the Pacific Christian Advocate, Vol. XIV., No. 28, July 11, 1868:

"All things on earth are mutable. * * Four years have elapsed and our term of office as Editor of the P. C. Advocate has terminated. * * Coming into the office without editorial experience, the various and onerous duties of *Editor, publisher and office agent* pressed heavily upon us. * *

H. C. BENSON."

Also, following, is an extract from the valedictory of Isaac Dillon, entitled "Our Last Words," in the Pacific Chistian Advocate, Vol. XXII., No. 32, August 10, 1876:

"With this issue we make our exit from editorial life. The event is of more importance to us than to others, but we confess we have no tears to shed over it. The editorship of this paper is no sinecure—it is a post of responsible hard work. For more than eight years we have occupied the office, being for nearly the whole time *Editor, business-manager—factotum.* * *

ISAAC DILLON."

and also the fact of the relation or position of the Editor to such a newspaper. The court had the means of knowledge and the right to presume that the Editor was the publisher, that is printer.

Greanleaf, in his work on Evidence, after enumerating various facts of which courts will take judicial knowledge says: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."

Greanleaf Ev., Vol. 1, Sec. 6.

In order to show the change which has been wrought in the nomenclature pertaining to the printing office within the last few years, and even since the enactment of this statute under consideration, and also to show that the word "Editor" was synonymous or might be used in the same sense, we will refer to the standard lexicography of America, which is sensitive and obedient to the change in the use and meaning of words of our language.

We will take the term "Editor" in Webster's Unabridged Editions of 1863 and 1870: (*a*)

1863—EDITOR, 1. *A publisher;* particularly a person who superintends the impression of a book; the person who revises and prepares a book for publication as Erasmus, Scaliger, &c. 2. One who superintends the publication of a newspaper.

1870—EDITOR, One who edits, especially a person who prepares, superintends, revises and corrects a book, magazine, or newspaper for publication.

An Editor is one who edits a book or newspaper—to edit is to put forth—to publish—to superintend the publication of—to conduct—to manage.—(See Webster's Unabridged Dictionary.) As above shown by the standard lexicography of the day, the word "Editor" was purely synonymous with the word *publisher;* that the primary meaning of the word "Editor" was publisher at the time of the enactment of the statute referred to, and that the word printer as used in the statute meant publisher and it follows as a reasonable and proper conclusion that the affidavit proving publication of summons, was furnished by the party authorized by the statute, and that the State Circuit Court was authorized so to hold.

THE SECOND AND FOURTH ERRORS:

But conceding that the affidavits before the State Circuit Court in the case of Mitchell vs. Neff were insufficient to warrant the making of the order for publication of the summons, and rendition of the judgment which the court did make and render, still the

(*a*) Changes in the signification of words employed in other branches of industry have also been effected by the use of labor-saving machinery. For instance, in agriculture, the term *reaper*, which, twenty years ago, signified a *man*, now signifies a *machine*.

fact remains, and is palpable upon the record, that the State Circuit Court with these affidavits before it adjudicated upon their sufficiency and conformity with the law, and upon the facts as necessary to give it jurisdiction, and such adjudication is final and conclusive unless reviewed by a court having appellate and revisory powers, or by a direct proceeding to vacate the judgment.

The statutes of Oregon thus defines a judicial record:

"A judicial record, is the record, official entry or files of the court of justice, or of the official act of a judicial officer, in an action, suit or proceeding."

Statutes of Oregon, Sec. 719, p. 254.

Such a record cannot be contradicted by the parties to it.

Statutes of Oregon, Sec. 668, p. 246.

The Legislature of the State of Oregon, has provided as follows, in regard to the judgment roll which is intended to be the evidence of its judgments:

"After docketing the judgment and before the next regular term of the court, the Clerk shall prepare and file in his office the judgment roll as provided in this section—

1. If the complaint has not been answered by any defendant, he shall attach together in the order of their filing issuing and entry, the complaint, summons and proof of service and a copy of the entry of judgment.

2. In all other cases, he shall attach together, in like manner the summons and proof of service, the pleadings, bills of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment."

Statutes of Oregon, Sec. 269, pp. 160, 161.

We hold that the court below did not possess the appellate and revisory power to pass upon collaterally or inquire into the sufficiency of the affidavit for publication of summons, as the sufficiency of that proof was passed npon and adjudicated by the State Circuit Court. The presentation of the affidavit required that court to act upon it. The State Circuit Court is a court of general jurisdiction. (See Const. of Oregon, Art. 7, Secs. 1 and 9.) It had jurisdiction of the subject matter of the action and it had jurisdiction rightfully to order the service of summons to be made upon the defendant by the publication thereof. And having embodied in its order, the averment of the jurisdictional facts, found by it and upon which it was authorized to make such order, its judgment is conclusive and cannot be attacked collaterally.

The State Circuit Court is a court of record.

Statutes of Oregon, p. 227.

"A court of record is that, where the *acts and judicial proceedings are enrolled* in parchment, for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question."

3 Blackstone, 24.

Co. Litt., 260.

"Record—*Recordum*, is a memoriall or remembrance in rolls of parchment, of the *proceedings and acts* of a court of justice," &c.

Co. Litt., 260.

For the same object and purpose, the laws of Oregon require the *judicial proceedings* of the Circuit Court, *to be recorded* by the clerk and keeper of the records, in books provided for that purpose.

Statutes of Oregon, pp. 227, 158.

A judicial record, under the laws of Oregon, has the same meaning attached to it, as given by Blackstone and Lord Coke, and is equally conclusive, because the law does not permit it to be contradicted.

Stat. Oregon, Sec. 719, p. 254, and Sec. 668, p. 246.

In the recital or averment of facts in said order for publication of the summons, it is expressly declared that "it appears to the satisfaction of the court that the defendant (Neff) cannot after due diligence be found in this State, and that he is a non-resident thereof, that his place of residence is unknown to plaintiff and cannot with reasonable diligence be ascertained by him, and that the plaintiff has a cause of action against defendant, and that defendant has property in this county and State, it is therefore ordered," &c.

Thus it will be seen that every fact required to be established to the satisfaction of the court, in order to justify it in making an order for the publication of the summons, and without requiring a copy of the summons and complaint to be deposited in the post office, directed to defendant, was established to the satisfaction of said court, and was embodied in its order and there is no fact of record, and nothing in the record of the case, that contradicts the recitals in said order.

"Jurisdiction is the power to hear and determine. To make the order of publication required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The power to review and reverse the decision so made, is clearly appellate in its character, and can be exercised only by an appellate tribunal, or in a proceeding had directly for that purpose. It cannot and ought not to be done by another court in another case when the subject is presented incidentally and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attach-

ed in the original case, everything done within the power of that jurisdiction when collaterally questioned, is to be held conclusive of the rights of parties, unless impeached for fraud."

Cornett vs. Williams, 20th Wallace, page 249.

So, too, in regard to the proof of the publication of the summons. The recitals or averments of facts in the entry of judgment in Mitchell vs. Neff, declares, "that defendant had notice of the pendency of the action by publication of the summons for six successive weeks in the *Pacific Christian Advocate*, a weekly newspaper of general circulation, published in Multnomah County, State of Oregon, the last issue of which was more than 20 days before the 1st day of this term."

These recitals of facts show a full compliance with the statute of the State, and the order of the court requiring the publication of the summons. There is nothing in the said judgment entry that shows the proof before the court as to the publication of the summons, but there is nothing in the record of the case, or among the papers of the case that contradicts the recital in the said judgment entry as to the publication of said summons as therein stated.

"Every matter adjudicated becomes a part of their record which thenceforth proves itself without referring to the evidence upon which it has been adjudged."

Voorhees vs. Bank of the U. S., 10 Peters, 472.
" " " 2 " 163, 168.
Elliot vs. Piersol, 1 Peters, 340.
Bonsall vs. Isett, 14 Iowa, 312.
Tharp vs. Breeneman, 41 Iowa, 253.

In the case of Galpin vs. Page, 18 Wall., 366, this court thus states the law:

"When, therefore, the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

In the case of Tharp vs. Breeneman, 41st Iowa, p. 253, the return of service by the officer failed to show a sufficient return, but the court, in deciding the case, used the following language: "The judgment of the court ordering the sale of the lands, shows that the sufficiency of the service was determined. There being a notice which the court adjudged lawfully served, the proceedings cannot be regarded as void for want of jurisdiction, on account of irregularities appearing in the record, which affect the service. We will presume that due proof of all matters necessary to be shown was made to the court, upon which the adjudication of the sufficiency of the service was had."

Shawhan vs. Doffer, 24 Iowa, 218.

Pursley vs. Hays, 22 Iowa, 11.

Cooper vs. Sunderland, 3 Iowa, 125.

"Upon a collateral attack, the recitals in a judgment are conclusive of the question of jurisdiction of the person, when the judgment is rendered by a court of superior jurisdiction, and a recital of the service of the summons by publication; the affidavit and order showing service cannot be considered on such attack."

McCauley vs. Fulton, 44 Cal., 355; following 34 Cal., 402; 36 Cal., 695; 37 Cal., 462; 38 Cal., 436; 43 Cal., 643.

See also, 9 Johns, 288.

18 Cal., 504.

17 Wend., 487; 21 Wend., 40.

14 Peters, 458.

The regularity of the proceedings of the State Court and its strict conformity to the requirements of the statute, is not left to presumption. The record is not silent. The recitals or averments in the record are direct proof of compliance with all the requirements of law; and to hold that it did not have jurisdiction, is to contradict the record.

We submit the following extracts from judicial decisions, as arguments and authorities bearing on the points at issue:

"When a complaint or allegation is laid before a judge or magistrate, which it is his duto to hear and investigate, he must necessarily proceed to determine whether it is sustained by the facts, and having once obtained jurisdiction for this purpose, his decision must have the quality of every judicial decision and be final.".

Smith's Leading Cases, Vol. I., p. 826.

"There can be no doubt that the filing of a petition or complaint, such as ought not to be deemed sufficient on demurrer, may confer jurisdiction. The power to decide upon the sufficiency of a cause of action, as presented by the complainant's pleading, like the power to decide any other legal proposition, though erroneously applied, is binding until corrected by some superior power."

Freeman on Judgments, Sec. 118.

McNamara on Nullities, 137.

When a court or judicial officer, in the exercise of his rightful authority, adjudges upon a matter, that judgment is final between the parties and other privies claiming under them, and is conclusive on the facts which it embraces."

Shelden vs. Wright, 1 Selden, 497.

In the case of Bonser vs. Isett, 14 Iowa, 309, where the service was for husband and wife, and left with the wife, but did not state that the husband was "not found," the court holds as follows:

"We have several times held in a direct proceeding between the parties on appeal, that such a service was defective in failing to state in the return that the party intended to be served was 'not

found.' With these words in the return in this case, the service would have been complete. Without them it was, technically, incomplete. The question of its sufficiency was directly passed upon by the court. The language of its judgment is * * * "and it appearing that the defendants had each been duly served with notice of the pendency of the suit, and being each three times solemnly called come not, but make default." * * * It was the province of the court thus to determine its own jurisdiction over the person of the defendants. If in doing so it errs, the method of correcting the error is by an appeal; it cannot be passed upon and determined in a collateral proceeding. There is a clear distinction between a service insufficient only in the manner of making it, and a case where no service at all is made or attempt to be made. In the latter case there is no question of jurisdiction to decide, and if a judgment is rendered under such circumstances against a party it would be a nullity. In the former case, there is a question of jurisdiction raised which the court *ex necessitate* must decide; if it does so erroneously against the defendant, and renders a judgment for the plaintiff, such judgment would be voidable, nevertheless just as binding upon the parties, as any other judgment or decree until reversed and corrected on appeal."

In the case of Cooper vs. Sunderland, 3 Iowa, 114, it was said by the court, "If there be notice, or publication, or whatever else of this nature the law requires in reference to persons, its sufficiency cannot be questioned collaterally." Again, in the case of Morrow vs. Weed, 4 Iowa, 77, where the sufficiency of a notice was objected to, and where the probate court had passed upon the question, it was held that, "If the decision was erroneous, an appeal was the proper mode for correcting, and that the error could not be tried in a collateral proceeding."

"The true rule would seem to be, that whenever the question of jurisdiction *is one of fact* and is decided by the court whose proceedings are in question, the decision will be final, whether the question arises on a writ of error or in a collateral action," Riley vs. Waugh, 8 Cush., 220; * * * * Every attempt to go beyond this, and open the decision on matters of fact, must necessarily introduce uncertainty and confusion, and interfere with the salutary operation of the rule that questions which have been once decided, shall not again be drawn in controversy."

1 Smith Leading Cases, p. 832.

From a perusal of the opinion of the court, found of record in this case, it will be seen that the court relied upon the case of Galpin vs. Page, 18 Wallace, 350, and 3 Sawyer, 93, as a precedent for its ruling in this case. The record in the case of Galpin vs. Page, presents a different case than this. In Galpin vs. Page, the

record disclosed the fact that there had neither been an affidavit filed as a basis of an order for publication of summons, nor was there any order of the court for publication of the summons against the non-resident defendant—and consequently there was no legal publication of summons, or appointment of guardian *ad litem* for the minor non-resident defendant. (See 18 Wall., 354.) The order of the court appointing a guardian *ad litem* was a mere arbitrary decretal, in direct contravention of the requirements of the statute, and hence the decree rendered by the court in such a case was void for the want of jurisdiction, appearing on the record.

The record in this case, however, discloses the fact that the affidavit of the plaintiff upon which the order for publication of summons was made, and the affidavit that publication had been made, upon which the judgment of the court was rendered, *were both before the court*, and that the court *ex necessitate* considered them and passed upon their sufficiency and conformity to the statute. In the first case the order of the court was *a bald usurpation of power*, in the latter case, even if the affidavits were insufficient, it was simply an *error in judgment.*

The line of distinction between the two cases has been so clearly stated by Justice Baldwin in Voorhees vs. Bank of United States, 10 Peters, 469, that we feel compelled to quote as follows:

"The line which separates *error in judgment* from the *usurpation of power* is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudged or purporting to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution."

There is another distinction between the case of Galpin vs. Page and the present case. The decree rendered by the District Court of California, which was offered in evidence on trial of the case of Galpin vs. Page, in the Circuit Court of the United States for the District of California, was not attacked collaterally in the proper meaning of the term. (See Galpin vs. Page, pp. 105, 106.) The said decree had been taken to the Supreme Court of California and by that court reversed before it was offered in evidence in the Circuit Court of the United States for the District of California. It was, therefore, of no validity at the time it was offered in evidence, so far as the matters it purported to adjudicate.

On the other hand, the judgment in the case of Mitchell vs. Neff, is a valid and binding judgment of the State Circuit Court,

and has never been reversed or set aside by any appellate or revisory power, or vacated in a direct proceeding—and there is no want of jurisdiction appearing on the record of the proceedings of the court rendering the judgment.

We believe the law is well settled, that a court of strictly concurrent jurisdiction, and clothed with no appellate or revisory powers, has no legal right to pass upon, in a collateral proceeding, the sufficiency of the affidavits or proofs, which the record plainly discloses were passed upon by the court, the judgment of which is in evidence, and to set aside such a judgment for what is deemed to be errors in the findings of the court.

And we believe the law should be held, that the State Circuit Court of Oregon being a court of general jurisdiction, and having jurisdiction of the subject of the action in Mitchell vs. Neff, was not required to embody in said record the evidence of the jurisdictional facts, but only the conclusion of facts upon which it acted in making the order for publication of summons and rendering the judgment therein; and that it should be conclusively presumed that it had before it the evidence of every jurisdictional fact required by the statute, because the averments in the record so affirm it, and there is nothing therein that contradicts it.

We believe and hold, that such a judgment cannot be attacked collaterally when offered in evidence; and that the lower court *erred* in holding "that the State Circuit Court acquired no jurisdiction to make and render the order for the publication of the summons in the action of Mitchell vs. Neff in said court, or to give any judgment therein against said Neff, or upon which said premises in controversy could be lawfully seized or sold."

Wherefore, for these errors, we confidently conclude that this court will reverse the judgment of the United States Circuit Court, and, upon the special findings of fact, render judgment for plaintiff in error.

THE FIFTH ERROR:

Section 57 of the Revised Statutes of Oregon reads as follows: "The defendant against whom publication is ordered, or his personal representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown and upon such temes as may be proper, be allowed to defend after judgment, and within one year after the entry of judgment on such terms as may be just, and if the defense be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct.

But the title to property sold upon execution issued on such judgment to a purchaser in good faith, shall not thereby be affected."

In the interpretation of this statute, the intention of the law-makers must, if possible, be ascertained and carried out. (Blackstone, 59.) Now to suppose that they made, or intended any exception to be made to the full and complete application of the guarantee contained in the last clause of the section, would be to convict them of making a mental reservation, an act which, as Vattel justly intimates, is unworthy any civilized law-making power. (Vattel, book 2, Sec. 275.)

When the Legislature, in the provision quoted, guaranteed the title to property sold upon such judgment, it thereby intended to extend this inviolability to all sales upon execution, upon such judgments. They did not intend that the inviolability of such sales upon execution, should be observed only, when such judgment was set aside as provided in section 57, and at the same time not protect the purchaser when such judgment was declared void in collateral proceedings; for the plain reason that the law does not contemplate that a judicial officer shall render judgment, in any case, in any other than a legal and valid manner. It is, therefore, the conclusive presumption, that they intended the clause to be of universal and unvarying applicability, and as it is the duty of courts, in the interpretation of statutes, to so interpret them, that the clear intention of the law-making power shall have full force and effect, we do hold, that it is imperative on the courts to so regard this clause, as one that gives to "a purchaser in good faith" a title unassailable either by direct proceedings, as allowed by the statutes, or by collateral proceedings, begun only when the willful laches of the judgment debtor has closed the door the statute generously left open to him for the rectification of any wrongs he may have suffered by the errors of the court.

If a purchaser in good faith, of property sold on an execution issued under such a judgment, can be evicted in a collateral proceeding by the person against whom the unreversed judgment was rendered, then there is a contingency, not even hinted at by the statute, in which such statutory guarantee is of no efficacy whatever. Conceding such a right, in a court of concurrent jurisdiction, and then such clause must be interpreted to read as follows:

"But the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected, *provided* the execution is not based on a judgment which a court of concurrent jurisdiction, in a collateral action may declare to be void."

Now, such an interpretation of the statute is not to be allowed, because, by it, new clauses and provisions are required to make it sensible and practicable. (U. S. vs. Bassett, 2 Story, 389.)

It will be seen at a glance, that such an interpretation would defeat the object which the law-makers undoubtedly had in view, in affording that guarantee, viz., that by affording such protection to purchasers, at such sales *the very highest price would be realized for the benefit of the absent defendant.* Let this guarantee be destroyed, by the interpretation, that a purchaser, must examine the record at his peril, and must pass a correct judgment as to whether the court has erred or not in its judicial findings, in order to be protected, then we do submit, that the wording of the statute, by such interpretation, is most effectually changed, and that it is not "a purchaser in good *faith*" that cannot be affected, but the title only of "a purchaser with infallible knowledge" as to the correctness of the court's ruling that shall have such protection. Such an interpretation virtually nullifies the statute.

"If the purchaser was responsible for the mistakes of the Court, in point of fact, *after they had adjudicated upon the facts and acted upon them*, these sales would be snares to honest men. The purchaser is not bound to look further back than the order of the court."

Thompson vs. Tolmie, 2 Peters, 162.

By virtue of the provisions of the statute quoted, that the title to property sold upon execution issued on a judgment against a non-resident defendant to a purchaser in good faith, shall not be affected in case such judgment should be set aside or reversed, notice was thereby given to the purchaser that the defendant might, within a given time, be allowed to defend after judgment, and to defeat the same if the facts so warranted, and it was in such case provided that such restitution may be compelled as the court should direct, "but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be thereby affected."

Now, under the special findings of facts in the case, (see pages 6 and 7 of printed record) the judgment was against a non resident defendant, the purchaser, (plaintiff in error) to whom the Sheriff's title passed, was a purchaser in good faith, and for a valuable consideration. Upon these special findings of fact, the plaintiff in error was entitled to the judgment of the court, and for this error the judgement ought to be reversed.

CONCLUSION:

In conclusion of the whole case, upon the errors assigned upon the record, to the rulings of the U. S. Circuit Court for the District of Oregon upon the special findings of fact in the case, we insist that when the affidavit and motion for publication of summons was filed and laid before the State Circuit Court in the action of

Mitchell vs. Neff then pending therein, the said State Circuit Court, was required to act thereon, and had jurisdiction to make the order for the publication of the summons; that the subject of the action was within the jurisdiction of that court; that every step or proceeding required by the statutes of Oregon to procure service of the summons by publication thereof, was taken in that case, and the sufficiency thereof adjudicated by that court, and as a conclusion therefrom, that the judgment of the said State Circuit Court was valid—not void;—that said court had jurisdiction to render the same; and that the U. S. Circuit Court for the District of Oregon erred in this case, in holding said judgment as void, when offered in evidence.

We hold that the record in the said case of Mitchell vs. Neff in the State Circuit Court, showed jurisdiction, to render the judgment therein against Marcus Neff the non-resident defendant, as a means of subjecting his property in the State of Oregon and within the jurisdiction of the court to the satisfaction of the claim of one of its citizens; that the averments of the jurisdictional facts found by the said State Circuit Court in said case of Mitchell vs. Neff and embodied in the order of publication, and in the judgment entry, cannot, in a collateral inquiry, be contradicted by mere negative inferences or absence of proof in the files of the court; that these averments were not contradicted, by any facts appearing in the record of the case; that when this judgment record was introduced in evidence before the lower court, its province was to inspect the record, to ascertain whether the State Circuit Court, under the provisions of the statute, had jurisdiction to render the judgment therein; and it had no right in the determination of this question to inquire into the sufficiency of any affidavit or any other proof, upon which the State Circuit Court may have acted or adjudicated, because that court had the undoubted power and jurisdiction to pass upon that question; that the U. S. Circuit Court exceeded its province, and the power of its jurisdiction, in extending its inquiries into an examination of the evidence of the jurisdictional facts upon which the State Circuit Court acted. The State Circuit Court, in the rightful exercise of its jurisdiction, passed upon the jurisdictional facts found by it, and placed those facts upon its records, as the evidence and perpetual memorial of its jurisdiction and its judgment. The positive averments of the jurisdictional facts so found by the State Circuit Court, and embodied in its record in the case of Mitchel vs. Neff, conclusively showed jurisdiction to render the judgment therein, and the same ought to have been held as valid in the lower court.

Wherefore, for the errors in the U. S. Circuit Court in its rulings and conclusions of law in this case, we pray that its judgment be reversed, and that judgment on the special findings of facts be rendered for plaintiff in error.

W. F. TRIMBLE,
Att'y for Pl'ff in Error.

IN THE

Supreme Court of the United State

SYLVESTER PENNOYER,
Plaintiff in Error,

vs.

MARCUS NEFF,
Defendant in Error.

BRIEF OF JAMES K. KELLY

FOR DEFENDANT IN ERROR.

PORTLAND, OREGON:
STEAM PRINTING ESTABLISHMENT OF GEO. H. HIMES.

1877.

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Defendant in Error.

BRIEF AND ARGUMENT OF JAMES K. KELLY, ATTORNEY FOR DEFENDANT IN ERROR.

The opinion of the learned Judge before whom this cause was tried in the Court below, appears to us so conclusive upon the points which induced his decision in our favor, as to render any discussion of them here on our part unnecessary. Should this Honorable Court, however, deem it proper or neces-

sary to go beyond them in the consideration of this cause, then we venture to submit our views upon the point raised and decided against us, basing our right to do so on the principle that if the judgment be right although a wrong reason be given for it there is no error and it must stand. We claimed in the Court below, and now respectfully assert here, that the only way in which property in this State of a non-resident can be subjected to the payment of the debts of resident creditors, is by a proceeding *in rem*, and that any judgment *in personam* upon a substituted or constructive service, against a non-resident who was never personally served with process and who never appeared in the case, is void.

We may remark at the outset that jurisdiction is the right to hear and decide, and it must be exercised in one of two modes, either *in rem* or *in personam*. Jurisdiction is conferred on the Courts of a State, by its Constitution and Laws, adopted and passed subject to, and in accordance with the Constitution of the United States, and in interpreting such laws and Constitution, so adopted and passed, it is proper to refer to those rules of International Law, which it is fair to presume the law-making power had in view at the time of framing its enactments. It is on all hands admitted that laws can not operate extra-territorially. Mr. Justice Story says: "No sovereignty can extend its process be-

yond its own territorial limits to subject *either persons or property* to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals."

Story Conf. of Laws, § 639.

See also, Mitchell admr. vs. Gray, 18 Ind., 125.

Hall vs. Williams, 6 Pick, 232.

Bissell vs. Briggs, 9 Mass., 468.

D'Arcy vs. Ketchum, 11 How., 174.

But whilst this is so it is conceded that each State has the undoubted right to subject property which is within its territorial limits to the payment of creditors therein, the mode, however, of exercising this right must be, as we think, by a proceeding *in rem*, for, as the process of the State Court issues in the name and by authority of the State, to hold that such process could personally bind a person confessedly without the territorial limits, would be to contravene the rule laid down, and be a stretch of authority little short of usurpation.

His Honor, Field J., in Galpin vs. Page.

3 Sawyer 93, speaking on this point says:

"The validity of the statute can only be sustained by restricting its application to cases where *in connection* with the process against the person, property in the State is brought under the control of the Court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the State."

It certainly can not be claimed in this case that "*in connection with the process against the person*" there was any proceeding against the property. The process being *in personam*, all subsequent proceedings in the case, up to the termination of it in the judgment, were of the same character, and gave the Court no jurisdiction over the *res*. The property was not subjected to the control of the Court previous to the judgment, and was never seized until after its rendition, and then only upon execution based thereon. If the Court, then, had no jurisdiction to render a valid judgment *in personam*, the execution resting for its validity on the judgment, partakes of its defects and falls with it.

Webster vs. Reid, 11 How., 459.

When it is sought to subject the property of a non-resident to the payment of debts, it may be done

by a seizure therof and the giving of such notice as the law of the forum prescribes. The Court thereby acquires a rightful jurisdiction *in rem*, and may condemn the property thus seized to pay the debt of the attaching creditor.

Story Conf. of Laws, § 549.

Note 2 to said Section.

Drake on Attachments, § 5.

Galpin vs. Page, 3 Sawyer, Pages 124-125.

The fact that the form of the pleadings and the judgment entered, in a case where there has been an attachment of property, seems to be *in personam*, in no respect militates against the views expressed; for such pleadings and judgment must be regarded as the means only by which the *res* is subjected to sale.

Suppose Neff, during the pendency of the action against him by Mitchell, had sold the property in controversy to a *bona fide* purchaser, and had duly executed a deed therefor, will any one contend that such vendee would not have taken a good title? Every one concedes that such a sale would effectually have cut off any right to subject the property to the payment of the judgment recovered in the action.

Had such sale been made by Neff pending the action against him by Mitchell, and had Neff, one or two years after the rendition of the judgment, acquired property in Oregon, would not such property have been liable to execution on the judgment, notwithstanding Neff's sale of the land owned by him at the commencement of the action?

This being conceded, shows that the property in question was in no respect affected by the pendency of the action, and that the judgment recovered in the case, was, if it operated at all, personal in its nature and effects.

But could it operate at all *in personam?*

To hold the affirmative necessarily implies that a Court of one sovereignty may, by its process, compel the citizens of another to litigate their rights in a foreign forum—a proposition too monstrous to receive judicial sanction. In Cooper vs. Smith, 25th Iowa, 269, Cole, Judge, says: "It is an elementary doctrine when no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant based on a publication of the pendency of a suit will be void, and may be impeached collaterally or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it."

Inasmuch as there was not, pending the proceedings in Mitchell vs. Neff, any seizure of property, the right to levy an execution on the land of the defendant in that action depended on the question whether or not there had been a valid personal judgment in the case.

Where a personal judgment has been rendered upon substituted service against a non-resident, who never appeared in the action, and such judgment is made the basis of an action in another State, the Courts of the latter have generally refused to recognize it as of any binding force, and the reasons which are assigned for so doing appear to us conclusive against the validity of such judgment, even in the forum in which it was rendered.

Picquet vs. Swan, 5 Mason, 40.

Bissell vs. Briggs, 9 Mass., 468.

Galpin vs. Page, 18 Wall, 367.

Steel vs. Smith, 7 W. & S. Penn., 451.

Oakley vs. Aspinwall, 4 Com. N. Y., 520.

D'Arcy vs. Ketchum, 11 How., 174.

Galpin vs. Page, C. C. of U. S. for Cal., Pam., 11.

Thompson vs. Whitman, 18 Wall, 465.

In the light, then, of the principles enunciated, let us for a moment examine our own statute. It will be first observed that one jurisdictional fact, which must appear before the Court will make an order of publication against a non-resident, is that he has property within the forum.

See Oregon Code, § 55, ¶ 3.

The law undoubtedly requires this, in order that the Court shall not be called upon to exercise its powers ineffectually, and, as it is fair to presume that the law makers were fully aware of the distinctions between proceedings *in rem* and *in personam*, and that the Courts had refused to recognize the publication of summons as giving jurisdiction either in the one case or the other, in the case of a non-resident, who was never otherwise served and never appeared, we should naturally expect to find some law conferring a rightful jurisdiction over that property, the *suits* of which furnishes the reason for calling into exercise the judicial power. This is done by section 143, ¶ 2, of the Oregon Code, which provides for the attachment of the property of a non-resident situated in the State. This section, as far as is necessary to be quoted, is as follows :

§ 143. A Writ of Attachment shall be issued by the Clerk of the Court in which the action is pend-

ing, whenever the Plaintiff or any one on his behalf shall make and file an affidavit that a cause of action exists against the defendant, and the grounds thereof, and that the defendant is either

1st, * * * * * * or,

2nd, That he is not a resident of this State or has departed therefrom, with intent to hinder, delay, or defraud his creditors, &c., &c.

Again, as though *ex industria* to exclude any construction other than that for which we contend, the Legislature, in section 506 of the Oregon Code, uses the following significant language: "No natural per-"son is subject to the jurisdiction of a Court of this "State, unless he appear in Court, or be found with-"in the State, or be a resident thereof, or have property therein; *and in the last case only to the extent "of such property at the time the jurisdiction attached.*"

To our minds this language not only negatives any presumption that the Legislature intended to confer a jurisdiction *in personam* over a non-resident, but at the same time it shows their design to grant to the Courts jurisdiction over the property alone—a jurisdiction to be exercised *in rem* by a seizure of the property.

The language of McLean, J., in Boswell's Lessee vs. Otis, 9 How., 348, strongly supports our construction. "Jurisdiction" says he, "is acquired in one of "two modes, first as against the person of the defend- "ant by the service of process; or secondly, by a "procedure against the property of the defendant "within the jurisdiction of the Court. In the latter "case, the defendant is not personally bound by the "judgment beyond the property in question, and it "is immaterial whether the proceeding against the "property be by an attachment or bill in chancery. "*It must be substantially a proceeding in rem.*"

In Mitchell's Admr. vs. Gray *et al*, 18 Ind., 125, Worden, J., says: "For the purpose of a decree *in rem*, a decree of foreclosure merely, publication against a non-resident was undoubtedly sufficient. But in our judgment such publication was not sufficient to give the Court jurisdiction to render a judgment or decree *in personam*."

Duram vs. Preston, 18 Iowa, 399.

Hakes vs. Shupe, 27 Ib., 468.

In concluding our discussion of this branch of the cause, we would say it appears to us that the obvious corollary of the principles enunciated and of the re-

cent cases, is to establish the doctrine, that a substituted service confers no jurisdiction over the person or the thing, in the case of a non-resident in any State, unless there is, prior to judgment, a seizure of the property which is sought to be subjected to the control of the Court.

JAMES K. KELLY,

Attorney for Defendant in Error.